TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 178.

TURRET STEAMSHIPPING COMPANY (LIMITED), CLAIMANT OF THE STEAMSHIP "BARNSTABLE," PETITIONER,

vs.

A. C. HALL ET AL., OWNERS OF THE LATE SCHOONER "FORTUNA," ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR CERTIORARI FILED JANUARY 3, 1900.
CERTIORARI AND RETURN FILED JANUARY 30, 1900.

(17,593.)

(17,598.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 484.

TURRET STEAMSHIPPING COMPANY (LIMITED), CLAIMANT OF THE STEAMSHIP "BARNSTABLE," PETITIONER,

vs.

A. G. HALL ET AL., OWNERS OF THE LATE SCHOONER "FORTUNA," ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1897.

No. 249.

THE BARNSTABLE.

TURRET STEAMSHIPPING COMPANY, LIMITED, CLAIMANT OF THE STEAMSHIP BARNSTABLE, APPELLANT,

v.

A. G. HALL ET AL., LATE OWNERS OF THE SCHOONER FORTUNA, LIBELLANTS, ARTHUR W. NUNAN, PETITIONER, HAROLD EMERNAN ET AL., ADMINISTRATORS, ET AL., PETITIONERS, ISAAC B. STEWART, ADMINISTRATOR, PETITIONER, AND BOSTON FRUIT COMPANY, CHARTERER OF THE STEAMSHIP BARNSTABLE, RESPONDENT, APPELLEES.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

[FILED IN CIRCUIT COURT OF APPEALS, APRIL 21, 1898.]

UNITED STATES OF AMERICA,
MASSACHUSETTS DISTRICT, ss.

At a District Court of the United States begun and holden at Boston, within and for the District of Massachusetts, on the third Tuesday (being the fifteenth day) of March, in the year of our Lord one thousand eight hundred and ninety-eight.

Before

THE HONORABLE FRANCIS C. LOWELL, *Judge.*

A. G. HALL ET AL., LIBELLANTS,

v.

THE STEAMSHIP BARNSTABLE.

This libel was filed in the clerk's office on the fifteenth day of January, A. D. 1896, and is as follows, viz: —

LIBEL.

DISTRICT COURT OF THE UNITED STATES,
DISTRICT OF MASSACHUSETTS. IN ADMIRALTY.

To the Honorable THOMAS L. NELSON, *Judge of the District Court of the United States within and for the District of Massachusetts:*

A. G. Hall, Fred L. Davis and John W. Greenlaw, of Gloucester, District of Massachusetts, late owners of the schooner Fortuna of said Gloucester, in behalf of themselves and her late crew, exhibit this, their libel, against the British steamship Barnstable, now lying in the port of Boston, within the jurisdiction of this Honorable Court, her engines, boats, tackle, apparel and furniture, and against all persons lawfully intervening therein, in a cause of collision, civil and maritime; and thereupon the said libellants allege and articulately propound as follows: —

First. The said schooner Fortuna, owned as aforesaid, was a two-masted schooner of one hundred and eighteen tons register, and on Jan. 13, 1896, the said schooner left Boston bound on a fishing voyage; that she was then tight, staunch and seaworthy, well manned and equipped, and commanded by John W. Greenlaw, an able and experienced master, all of which facts continued until after the collision hereinafter described.

Second. That at sunset on said Jan. 13, the side lights of said schooner were lit and set in regulation lantern boxes in the fore rigging, and the said side lights continued properly set and brightly burning until after the collision hereinafter described.

After 6 P. M., the said schooner Fortuna was running before the wind on the starboard tack and the weather was clear. The said schooner had her four lower sails set and was going through the

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water at the rate of about four knots an hour. Between 6.30 and 7 P. M., while thus proceeding, a proper lookout being stationed forward, a competent man at the wheel and the deck being in charge of the master, the masthead light of a steamer was seen by the man on lookout and duly reported; that said light bore a little forward of the starboard beam of said schooner, and said light appeared to be over a mile distant. Not long afterwards the red light of the steamer bearing said masthead light was seen still bearing on the starboard beam of said schooner; that thereafter said red light was shut out and the green light of said steamer was seen by the man on lookout of said schooner, all of which lights were duly reported by the lookout to the officer in charge of the deck. Suddenly said steamer, which could then be plainly seen, swung to starboard and struck said schooner a little abaft the fore rigging on the starboard side, causing her to at once fill with water and sink, and resulting in the loss of the said schooner and her outfits, the personal effects of her master and crew, and the lives of nine (9) of her crew.

Third. That just before the collision took place, and when a collision was inevitable, the master of said schooner ordered the men at the wheel to put his helm hard-a-starboard, and the schooner swung off a very little to port just as said steamship, which proved to be the said steamship Barnstable, struck the schooner, thus easing the blow a little by causing the angle of the collision to be a little more slanting than it otherwise would, and thereby enabling the majority of the crew to save their lives by climbing over the bow of the Barnstable.

Fourth. That the collision and the damage resulting therefrom were caused wholly by the fault of those on board of the steamer Barnstable and those in charge of her, among other things, —

1. In not keeping clear of a vessel under sail.
2. In not having a proper lookout, and in not seeing and observing the green light of said schooner.
3. In ordering her helm to port when she should have ordered her helm to starboard.
4. In not stopping and reversing.
5. And other faults to be shown at the trial of this cause.

Fifth. That the said schooner Fortuna and those in charge of her

were wholly without fault and did all that could have been done to avoid a collision.

Sixth. That by reason of the aforesaid collision the schooner Fortuna of the value of eleven thousand dollars ($11,000), her outfits and provisions of the value of fifteen hundred dollars ($1500), and the personal effects of the master and crew of the estimated value of four thousand dollars ($4,000), were all lost.

Seventh. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court, and the said steamship Barnstable is now lying in the port of Boston and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, your libellants pray that process in due form of law may issue against said steamship Barnstable, her engines, boats, tackle, apparel and furniture, and that all persons interested therein may be cited to appear and answer oath, and that this Honorable Court may be pleased to pronounce for the aforesaid damages and costs, and for such other and further relief as to justice may appertain, and as this Court is competent to give in the premises.

JOHN W. GREENLAW.

CARVER & BLODGETT, *Proctors.*

COMMONWEALTH OF MASSACHUSETTS,

SUFFOLK, ss. BOSTON, Jan. 15, 1896.

Personally appeared before me John W. Greenlaw, and subscribed to the foregoing libel, and made oath that the same was true to the best of his knowledge and belief.

In witness whereof, I hereunto set my hand and affix my notarial seal the day and year first above written.

[SEAL] ADDISON C. BURNHAM, *Notary Public.*

On the fifteenth day of January, A. D. 1896, the following claim was filed in the clerk's office, viz: —

CLAIM.

And now comes Edward E. Paine, of Boston, Mass., and states that he is the master of the steamship Barnstable, and that as such master he is the agent of the owners and entitled to her possession.

Wherefore, he claims that said steamship, her boats, engines, tackle, apparel and furniture, be at once delivered to him.

EDWARD E. PAINE.

COMMONWEALTH OF MASSACHUSETTS,
SUFFOLK, ss. BOSTON, Jan. 15, 1896.

Then personally appeared the above-named Edward E. Paine, and took oath that the statements above subscribed by him are true, before me,

[SEAL] FRANK H. MASON,
Notary Public.

STIPULATION FOR COSTS AND EXPENSES.

On said fifteenth day of January, A. D. 1896, personally appeared Edward E. Paine, of Boston, in the District of Massachusetts, master of said steamship, and as agent of the owners, claimant, and produced for sureties Frank E. Peabody, of Boston, and Robert Winsor, of Weston, both in said district. And the said Paine, Peabody and Winsor, submitting themselves to the jurisdiction of this court, bound themselves, their heirs, executors and administrators, jointly and severally, in the sum of two hundred dollars, unto the said libellant, that the said Edward E. Paine should pay all costs and expenses which should be awarded against him in this suit, upon the final adjudication thereof, or by any interlocutory order, whether it be in this or any appellate court.

STIPULATION TO THE ACTION.

On said fifteenth day of January, A. D. 1896, personally appeared Edward E. Paine, of Boston, in the District of Massachusetts, master of said steamship, and as agent of the owners, claimant, and produced for sureties Frank E. Peabody, of Boston, and Robert Winsor, of Weston, both in said district. And the said Paine, Peabody and Winsor, submitting themselves to the jurisdiction of this court, bound themselves, their heirs, executors and administrators, jointly and severally, in the sum of twenty-four thousand eight hundred dollars, unto the said libellants, that the said Edward E. Paine should abide by all orders and decrees, interlocutory or final, of the Court, and should pay the amount of the final decree of the Court, and all sums of money that he should be ordered to pay by the final decree of the Court, whether it be in this or any appellate court.

On the twentieth day of February, A. D. 1896, the following petition was filed in the clerk's office, viz: —

PETITION OF ARTHUR W. NUNAN.

To the Honorable THOMAS L. NELSON, *Judge of the District Court of the United States within and for the District of Massachusetts:*

Arthur W. Nunan, of Gloucester, District of Massachusetts, exhibits this, his petition, to intervene as co-libellant against the steamship Barnstable, her engines, boats, tackle, apparel and furniture, under the libel of A. G. Hall *et al.* against said steamship Barnstable, which was filed in this court on the fifteenth day of January, 1896, to recover damages for the loss of the schooner Fortuna caused by a collison with said steamship Barnstable, in a cause of tort, civil and maritime; and thereupon your said petitioner doth allege and articulately propound as follows: —

First. That by reason of the collision set forth in said libel of A. G. Hall *et al.* against the steamship Barnstable your petitioner was thrown down, and thrown against the side of said schooner and severely injured; that by reason thereof he was struck, bruised and otherwise injured, both externally and internally, and suffered, and still suffers, great pain and anguish, both of body and mind; that by reason thereof your petitioner was confined to the hospital for a long period of time and put to large expense for medicines and doctors; that by reason thereof your petitioner was permanently injured and rendered unable to perform any labor or to earn his livelihood, to the damage of your petitioner in the amount of five thousand dollars ($5,000).

Second. That by reason of the said collision set forth in said libel, your petitioner also lost all his personal effects to the value of one hundred dollars ($100).

Third. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court, and that a sufficient bond was given by the owners of said steamship Barnstable, in said libel of A. G. Hall *et al.*, to cover all damage caused by said collision.

Wherefore, your petitioner prays that he may be allowed to intervene in said libel against said steamship Barnstable, her engines,

boats, tackle, apparel and furniture, and that all persons interested therein may be cited to appear and answer under oath, and that this Honorable Court may be pleased to pronounce for the aforesaid damages and costs, and for such other and further relief as to ustice may appertain, and as this Court is competent to give in the premises.

ARTHUR W. NUNAN.

CARVER & BLODGETT, *Proctors.*

COMMONWEALTH OF MASSACHUSETTS,
SUFFOLK, ss. BOSTON, Feb. 19, 1896.

Personally appeared before me, Arthur W. Nunan, and subscribed to the following petition, and made oath that the same was true to the best of his knowledge and belief.

In witness whereof, I hereunto set my hand and affix my notarial seal the day and year first above written.

[SEAL] ADDISON C. BURNHAM,
Notary Public.

This libel was entered at the December Term of this court, A. D. 1895, and thence was continued to the March Term thereof, A. D. 1896, when on the eighth day of April, A. D. 1896, the following affidavit was filed in the clerk's office, viz: —

AFFIDAVIT OF J. PARKER KIRLIN.

J. Parker Kirlin, being duly sworn, says that he is one of proctors for the claimant herein.

The libel herein was filed in the office of the clerk of this court on or about the 15th day of January, 1896, to recover damages for the loss of the schooner Fortuna and her outfit, and the personal effects of her master and crew, in a collision with the steamship Barnstable, which occurred on the 13th of January, 1896.

Afterwards, and on or about Feb. 19, 1896, Arthur W. Nunan filed a petition to intervene as co-libellant, and to recover for personal injuries sustained by him in the collision.

Process under the said original libel was waived, and the vessel being then in the port of Boston, the master of said vessel, E. E. Paine, on or about the 15th day of January, 1896, filed a claim for

said vessel, as bailee thereof, and stipulations for costs and value, by or in behalf of the Turret Steamshipping Company, Limited, were duly filed with sufficient surety in the sum of $25,000.

At the time of the filing of the said libel, and at all the times thereafter, the owner of the said steamship was the Turret Steamshipping Company, Limited, an English corporation. The said steamer, at the time of the collision, was running under a demise charter to the Boston Fruit Company, a corporation, as deponent is informed and believes, organized under the laws of the State of Massachusetts.

By the said charter party it was provided that the steamship should be manned and officered by the charterer, who should pay all wages, and the vessel was manned and officered by the charterer at the time of the collision, and there was no pilot aboard at said time.

The said owner of the Barnstable, the Turret Steamshipping Company, Limited, is about to file a petition under the 59th Rule in Admiralty, praying that the said charterer be brought in as a party that ought to be proceeded against in the present suit for the damage alleged in the libel, for the reason that if there was any negligence on the part of the officers or crew of said Barnstable, which contributed to the collision, it was negligence of the servants of the said chartered owner, and not the servants of the said Turret Steamshipping Company, Limited, the owner of the vessel. As the master of the Barnstable, said E. E. Paine, is the servant of the said party that the owners desire to have brought in as party defendant, it would be inconsistent for him as claimant to present the petition to the Court on behalf of the owners of the ship (*The Beaconsfield*, 158 U. S. 303, 309).

Wherefore the said Turret Steamshipping Company, Limited, as ownership of the steamship, prays to be substituted for and in place of the said E. E. Paine, as claimant of the Barnstable in said causes.

J. P. KIRLIN.

Sworn to before me, this 7th day of April, 1896.

[SEAL] FREDERICK GREEN, *Notary Public*,
New York County.

On said eighth day of April, A. D. 1896, the following Order of Court, with indorsed consent, was filed in the clerk's office, viz: —

ORDER OF COURT.

Upon reading and filing the affidavit of J. Parker Kirlin, verified April 7, 1896, and on the indorsed consent of the proctors for the libellants, and on application for the proctors for the claimant, It is ordered that the Turret Steamshipping Company, Limited, owner of the steamship Barnstable, be and the same hereby is substituted in place of E. E. Paine, master, as claimant herein.

BOSTON, April 8, 1896.

We hereby assent to the above order.

CARVER & BLODGETT,
Proctors for Libellants.

On said eighth day of April, A. D. 1896, the following petition was filed in the clerk's office, viz: —

PETITION OF THE TURRET STEAMSHIPPING COMPANY, LIMITED.

To the Honorable THOMAS L. NELSON, *United States District Judge for the District of Massachusetts:*

The Petition of the Turret Steamshipping Company, Limited, owner and claimant of the steamship Barnstable, in the suit of A. G. Hall, Fred L. Davis and John W. Greenlaw, and of Arthur W. Nunan, co-libellant by intervention, against the said steamship Barnstable, in a cause of collision, civil and maritime, respectfully shows to the Court as follows: —

First. Your petitioner is an English corporation, and at all the times hereinafter mentioned was the sole owner of the steamship Barnstable, her engines, tackle, apparel and furniture.

Second. On or about the fifteenth day of January, 1896, a libel was filed in this court by the said A. G. Hall, Fred L. Davis and John W. Greenlaw, against the said steamship Barnstable, to recover the sum of $11,000 damages alleged to have been sustained by the schooner Fortuna, $1500, the amount of provisions and outfit, alleged to have been lost, and $4,000, the estimated value of the personal

effects of the master and crew of the schooner, claimed to have been lost by reason of a collision between said schooner Fortuna and said steamship Barnstable, on the 13th of January, 1896.

On or about February 19 a petition of intervention was filed by Arthur W. Nunan, praying to be made co-libellant, and to recover against the steamship, her engines, etc., the sum of $5,000 for personal injuries alleged to have been sustained by him in the collision, and the sum of $100 for the alleged loss of his personal effects.

For greater particularity and certainty, a copy of the said libel and a copy of the said petition of intervention are hereto annexed and made a part hereof, and marked "Exhibit A" and "Exhibit B".

Third. On said fifteenth day of January, 1896, your petitioner caused an appearance to be entered, and a claim to be filed for the said steamship, and upon the libellants' demand caused a stipulation for costs in the sum of $200, and a stipulation for value, in the sum of $24,800, to be filed in the office of the clerk of this court, the steamship Barnstable being at the time in the port of Boston, and within the jurisdiction of this Honorable Court, and process of attachment having been waived by consent on condition of your petitioner filing the said stipulations in the amounts stated.

Fourth. Your petitioner alleges that at the time of the said collision on the 13th of January, 1896, its said steamship Barnstable was engaged under a charter, by which she had been hired and demised to the Boston Fruit Company, of Boston, a corporation organized, as your petitioner is informed and believes, under the laws of the State of Massachusetts, and at the time of the collision was bound for Boston, on a voyage for the said Boston Fruit Company, which was being made under and pursuant to the said charter. A copy of said charter party is hereto annexed, marked "Exhibit C", and made a part hereof. Your petitioner is advised and avers that said charter is a charter of demise.

Fifth. The charter party on its face is between R. Craggs & Sons, agents of owners, and said Boston Fruit Company, and is a charter of two steamships which were built by the said R. Craggs & Sons for said charterers, and named Barnstable and Brookline, said Barnstable being the vessel herein proceeded against. Before

the said collision, both of the said steamers had become by purchase the sole property of your petitioner, and said charter party had been assigned and transferred to it, and said charterer had attorned to your petitioner, and for a considerable period had been paying the agreed hire stipulated in said charter to be paid for the hire and use of the said vessel unto your petitioner.

Sixth. It was by the said charter party, amongst other things, provided as follows:—

"2. The charterers shall provide and pay for all oils and stores for the vessel, gear, tackle and appliances for loading and discharging the cargo, and for all the wages and provisions of the captain, officers, engineers, firemen and crew, who, excepting the guaranty engineer, shall be appointed by them. The owners shall appoint chief engineer for six months, their pay not to exceed that paid by the charterers in similar vessels."

Your petitioner alleges that the period of six months during which the owners had authority to appoint a guaranty engineer had expired before the said collision, and at the time of the said collision the master and all of the officers, engineers, firemen and crew were in the service and employment and under pay of the said chartered owner. It further alleges that the entire possession and control of the said vessel was, by the said charter party, vested in and transferred to said chartered owner for the period of the charter, and that your petitioner was not in possession or control of the said vessel at the time of the said collision, nor had it any agent or servant on board thereof.

Seventh. As your petitioner had no agent, officer or servant on board said vessel at the time of the collision, it has no knowledge or information of the facts and circumstances in connection with the said collision, except such as is derived from statements made to its legal representatives by the officers and crew of the said vessel, and by certain passengers who were on deck at the time of the collision. On the information thus acquired, your petitioner avers that the said collision was due to the fault or neglect of those in charge of the said schooner Fortuna, in omitting to show to the steamer the lights required by the regulations to prevent collisions at sea and in inland waters, and particularly in that the side lights, one or both of which

should have been burning and visible, for some time before the collision, to those on deck of the Barnstable, were not so visible for some reason unknown to your petitioner. It avers that the collision was further contributed to by the neglect and default of the schooner, in that she did not maintain a proper lookout or watch on deck, in charge of a competent and vigilant officer, and did not seasonably display a torch, as required by law. The said schooner was in fault in other respects, as will more fully appear upon the trial. Although the Barnstable, as your petitioner is informed and believes, was seaworthy and in all respects properly manned, outfitted and equipped at the time, and had a competent watch on deck, her master, an officer and wheelman being upon the bridge, and an able seaman stationed forward on the forecastle head, acting as lookout, all vigilant and attentive to their duties, those on board the Barnstable made out the loom of the Fortuna before any of her lights was visible to them. The vessels being at this time so close together that it was impossible for the Barnstable to stop her way in time to avoid the Fortuna, the helm was hard-ported in an effort to clear her or ease the blow, but, notwithstanding this manœuvre, the vessels were in collision, with the result that the Fortuna rapidly filled with water and sank after a short interval. Upon information and belief, therefore, your petitioner alleges that the said collision was solely due to the fault or neglect of those on board the Fortuna, and was not caused or contributed to by the fault or neglect of those in charge of the said Barnstable. Nevertheless, your petitioner further avers that said Barnstable is now being proceeded against under the said libel and said petition of intervention, upon a charge or charges of negligence on the part of those in charge of her at the time of the collision, and as the persons thus charged with fault were the agents and servants of said Boston Fruit Company, your petitioner presents this its petition, praying that said charterer may be brought in as a party under the 95th Rule in Admiralty, and may be proceeded against in the same suit, for such damages, for the reason that if said collision was caused or contributed to by any fault on the part of those in charge of the Barnstable, such fault is ascribable to said Boston Fruit Company and its servants, and not to said vessel herself, nor to your petitioner, as the owner thereof.

Eighth. The time of your petitioner to answer the libel has not expired, and said Boston Fruit Company has its principal place of business in the city of Boston, within the jurisdiction of this Honorable Court, where, as your petitioner is informed and believes, its officers reside and said company carries on its main business.

Ninth. Your petitioner avers that the said Boston Fruit Company ought to be proceeded against in the same suit with the said Barnstable, for the said damage.

Tenth. All and singular the premises are true, and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, your petitioner prays that process may issue against the said Boston Fruit Company, citing it to appear and answer the libel and the petition of intervention herein, as well as this petition, and that said Boston Fruit Company may be proceeded against in the same suit for such damages; and that if fault be found on the part of those in charge of the said Barnstable, said Boston Fruit Company may be condemned to answer and pay the said damage, or that this court will otherwise administer right and justice in the premises, between all the parties.

CONVERS & KIRLIN,
Proctors for Petitioner.

SOUTHERN DISTRICT OF NEW YORK,
CITY, COUNTY AND STATE OF NEW YORK, ss.

E. B. Convers, being duly sworn, says that he is one of the proctors for the petitioner herein, and that the foregoing petition is true according to his knowledge, information and belief. He further says that the reason why this petition is not signed by the petitioner, or one of its officers, is that the petitioner is a foreign corporation, and all of its officers are absent from the United States.

E. B. CONVERS.

Sworn to before me this seventh day of April, 1896.
[SEAL] FREDERICK GREEN,
Notary Public, New York County.

[N. B. The libel and petition referred to in the foregoing petition, as annexed thereto, marked "Exhibit A" and "Exhibit B", are here omitted, as they have already been made a part of the record.]

EXHIBIT C.

[COPY]

W. W. HURLBUT & Co.,
135 *Pearl Street*,
New York.

Cable Address,
"Dogbastian."
Watkins Code.
Scotts Code,
Telephone, "John 142."

TIME CHARTER.

NEW YORK, March 10, 1893.

IT IS THIS DAY MUTUALLY AGREED, between Messrs. R. Craggs & Sons, Agents of Owners of the two (2) good Screw Steamships to be built and called the (to be named by charterers) of the port of Stockton-on-Tees, of . . . . . Tons gross Register, and . . . . . Tons net register . . . . . horses power, provided with steam winches, spare propellor, spare Crank, and spare tail shaft and U. S. Certificate for 24 first class cabin passengers and Messrs. Boston Fruit Co. of Boston, U. S. A., Charterers as follows, viz.:

1. The said Owners agree and the said Charterers agree to hire the said Steamship for the term of 36 calendar months (or, in Charterers option, until the completion of any voyage commenced at any time before, but not completed until after the expiry of the said 36 months) commencing on the 1st to 15th day of March, 1894, she then being placed at the disposal of the Charterers, in their loading berth, in the port of Port Antonio Ja at such wharf or place (where she may always safely lie afloat) as the Charterers may direct, she being then tight, staunch, strong, her bottom newly painted, and every way fitted for the service; to be employed in any lawful trades between Central America and or North and or South America and or West Indies (not north of River St. Lawrence nor south of River Platte) in any order, as the Charterers of their Agents shall direct. River St. Lawrence debarred between Oct. 1st and May 1st.

2. The Charterers shall provide and pay for all oils and stores for the vessel, gear, tackle and appliances for loading and discharging the cargo, and for all the provisions and wages of the Captain, Officers, Engineers, Firemen and Crew who, excepting the guarantee Engineer, shall be appointed by them. The Owners shall appoint Chief Engineer for 6 months only, their pay not to exceed that paid by the Charterers in similar vessels. The owners shall maintain the vessel in a thoroughly efficient state in hull and machinery for the service, including winches with chain gear and donkey boiler.

3. The Charterers shall also provide and pay for all the coals and fuel, port charges, pilotages, agencies, commissions, and all other charges whatsoever, excepting for painting and repairs to hull and machinery, and anything appertaining to keeping the ship in proper working order. Such repairs as far as possible, and as is usual in such cases, to be done on board by the steamer's staff.

4. The Charterers shall pay for the use and hire of the said vessels at the rate of Five hundred and fifty pounds Br. Sterling (£550) each per calendar month, and at and after the same rate for any part of a month, the hire to continue from the time specified for terminating the charter until her delivery to the Owner (unless lost), at the port of in the U. S. A. North of Hatteras. Payment whereof shall be made in cash at New York semi-monthly in advance at the rate $4.85 per pound Br. Stlg., and in default of such payment or payments as herein are specified the Owners shall have the right of withdrawing the said steamer from the service of the Charterers, without prejudice to any claim the Owners may otherwise have on the Charterers in pursuance of this Charter.

5. That the cargoes shall be laden and/or discharged in any dock, or at any wharf or place that Charterers may direct where she can always safely lie afloat.

6. That the whole reach, burthen and passenger accommodation of the ship (not being more than she can reasonably stow and carry) shall be at the Charterers disposal, reserving only proper and sufficient space for ship's officers, crew, tackle, apparel, furniture, provisions and stores. Cargo and/or coals and/or cattle may be taken on deck at the Charterers risk so far as the same do not endanger the safety of the vessel.

7. The expense of loading and discharging shall be borne by the Charterers, the stowage shall be under the control of the Master, and the Charterers shall be responsible for the same. Ballast and Dunnage as required shall be found by Charterers. Sufficient cellular water ballast to be provided by owners, as per plan.

8. An inventory of plated ware, crockery, linen and all other fittings shall be taken at the commencement of this Charter. Anything lost or broken or afterwards required, to be replaced or provided by charterers. Fair wear and tear excepted.

9. The vessel shall be put into dry dock to have bottom cleaned and painted, if required by Charterers at owners expense every six months. Time so occupied shall not be paid for by Charterers.

10. The Master shall be under the orders and directions of the Charterers as regards employment, agency, or other arrangements; and the Charterers hereby agree to idemnify the owners from all consequences or liabilities that may arise from the Master signing Bills of Lading, by their orders, or those of their agents, or in otherwise complying with same. The master although appointed by Charterers to be satisfactory to the owners.

11. If the Charterers shall have reason to be dissatisfied with the conduct of the chief engineer during first 6 months, the owner shall on receiving particulars of the complaint, investigate the same, and if called upon, make a change in the appointments when the steamer is in. Owners have same privilege as regards Captain and officers and Engineers during continuance of charter.

12. [*Deleted.*]

13. That should vessel be lost, any hire paid in advance and not earned (reckoning from the date of her loss), shall be returned to the Charterers, with interest from date of loss.

14. That the Charterers shall have the option at any time during this Charter of purchasing the said vessel for the sum of £23000, owners agreeing to allow at the rate of 5% depreciation per year after the first twelve months.

15. That should any dispute arise between the Owners and the Charterers, the matters in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen, their decision, or any two of them shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of Court.

16. That the Owners shall have a lien upon all cargoes, and all sub-freights, for freight or charter money due under this Charter, and Charterers to have a lien on the ship for all moneys paid in advance and not earned.

17. In the event of loss of time from collision, stranding, want of repairs, break down of machinery, or any cause appertaining to the duties of the Owner preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease from the hour when detention begins until she be again in an efficient state to resume her service. Further, if in consequence of such deficiency, collision, want of repairs, break down or other causes, the vessel should put into any port or ports other than those to which she is bound, port charges, pilotages, and other expenses at those ports, shall be borne by the Owners; but should the vessel be driven into port or to anchorage by stress of weather, such detention or loss of time shall fall on the Charterers. It is understood in the event of steamer from above causes putting into any port or ports other than those to which she is bound that the charterers are covered as to expenses as the owners are by their insurance.

18. It is understood that the Bills of Lading used by the Charterers shall contain the usual "Neligence" cause.

19. The Charterers shall pay the Owners the current local price for any coals left in the steamers bunkers, and the Owners in like manner shall pay the Charterers the current local price for any coals remaining on board on completion of the present Charter.

20. United States Passenger Certificate for 24 passengers (first class) to be furnished by Owners. And passenger accomodation for 24 first class cabin passengers on the upper deck fitted in first class manner, with all napery, crockery, etc., usual for first class West Indian service.

21. [*Deleted.*]

22. That the Owners shall pay for the insurance on the vessel.

23. The benefit of all derelicts and salvages, as well as the los

of time and other expenses attendant thereon, to be for account of Owners and Charterers equally. Penalty for non-performance of this Contract, estimated damages.

24. An address commission of 2 1/2% on the amount of this Charter is payable by Owners to Charterers' agents.

25. Commission of five per cent. on the estimated amount of Freight is due and payable by Owners, on signment hereof to W. W. Hurlbut & Co., New York, Ship lost or not lost, as also on any extension or renewal of this Charter or purchase of vessel.

26. It is understood that Charterers' Captain joins at Middlesbro' and that the crew there shipped shall form the first complement.

Signed by
(*Signed*) R. CRAGGS & SONS.

In the presence of
(*Signed*) W. H. JOHNSON.

Signed by
(*Signed*) BOSTON FRUIT CO.,
A. W. PRESTON,
Manager.

In the presence of
(*Signed*) I. C. YOUNG.

We certify the above to be a true copy of the original Charter Party in our possession.

(Signed) BENNETT, WALSH & Co., *Brokers.*

(*Indorsed on Charter Party.*)

A. It is understood this charter is for two steamers to be built to meet the following requirements and charterers agree to accept same without further alteration.

B. Length about 230 feet B P (or say 240 feet overall), Breadth 31 feet 6 inches, and 24 feet 3 inches moulded depth. Lower hold to be 13 to 14 feet in depth and beams for fruit decks laid throughout holds and between decks of 7 feet clear.

C. Triple expansion engines of not less than 22″, 35″, 57″ and 36″ stroke with two large boilers of 14 feet diameter and 10′ 3″. Sufficient steam to drive the ship an average speed of 13 knots in ordinary weather with good coals while fruit laden.

D. Steamer to be on Cellular Bottom Principle. To have four side ports, to have 12 ventilators of twenty to 24 inches diameter. To have steam pipes in holds and tween decks reasonably satisfactory to charterers in order to prevent fruit from chilling in Winter. Awnings fore and aft. Ice house to hold 15 tons of ice. Permanent bunkers and cross bunkers provided to carry coal enough to steam 3500 miles.

E. General arrangement of steamers to be in accordance with plans and model furnished by owners. It being understood each steamer is to be at least 72500 cubic feet capacity for cargo including cross bunkers and at least 950 to 1000 tons Deadweight. Owners

to furnish electric lights and to arrange plans of cabins, position of side ports and details, specifications, &c. mutually with charterers.

F. Charterers to have option of naming these steamers.

G. Owners agree to have the first S. S. built and ready for sea in time for delivery at Port Antonio by March 1st 1894, and second steamer built and ready for sea by March 10th 1894, unless said delivery be prevented by riots, strikes and other causes over which the builders have no control.

SUMMONS.

Thereupon, on said eighth day of April, A. D. 1896, by order of the judge, a summons issued, commanding the marshal to summons the said Boston Fruit Company, a corporation duly established under the laws of the Commonwealth of Massachusetts, having a place of business at Boston (if it might be found in his precinct), to appear before the District Court of the United States, to be holden at Boston, within and for the Massachusetts District, on Friday, the seventeenth day of April current, at ten o'clock, A. M., then and there to answer to the foregoing petition.

And to make return of his doings into court.

And the marshal made return as follows, viz.:

UNITED STATES OF AMERICA,
MASSACHUSETTS DISTRICT, ss. BOSTON, April 8, 1896.

Pursuant hereunto, I have this day summoned the within named Boston Fruit Company to appear before the District Court of the United States, as within directed, by giving to Charles W. Sweet, Treasurer of said Company, a true and attested copy of this writ in hand at Boston.

F. X. MACDONALD, *Deputy U. S. Marshal.*

STIPULATION FOR COSTS AND EXPENSES.

On said eighth day of April, A. D. 1896, then appeared the Turret Steamshipping Company, Limited, a corporation established under the laws of the United Kingdom of Great Britain and Ireland, claimant of said steamship Barnstable, and produced for surety The City Trust, Safe Deposit and Surety Company of Philadelphia, incorporated under the laws of the State of Pennsylvania, having a place of business at Boston in said District. And the said parties submitting themselves to the jurisdiction of this Court, bound themselves, their heirs, executors and administrators, successors and

assigns, jointly and severally, in the sum of two hundred dollars, unto the Boston Fruit Company, a corporation duly established under the laws of the Commonwealth of Massachusetts, that the said Turret Steamshipping Company, Limited, should pay all costs and expenses which should be awarded against it in this suit, in favor of the Boston Fruit Company, aforesaid, upon the final adjudication thereof, or by any interlocutory order, whether it be in this or any appellate court.

From said March Term, this libel was continued from term to term to the September Term thereof, A. D. 1896, when on the second day of November, A. D. 1896, the following petition was filed in the clerk's office, viz: —

PETITION OF HAROLD EMERNAN ET AL.

To the Honorable THOMAS L. NELSON, *Judge of the District Court of the United States, within and for the District of Massachusetts:*

And now come Harold Emernan and James M. Anderson, both of Lunenburg, Nova Scotia, as administrators of the estate of Harvey Emernan, late of said Lunenburg; Levi Menac, of Port Medway, Nova Scotia, as administrator of the estate Crawford Menac, late of said Port Medway; Minnie A. Ackerman, of Boston, District of Massachusetts, as administratrix of the estate of William Ackerman, late of said Boston; Joseph Clark, of Cambridge, District of Massachusetts, as administrator of the estate of John Clark, late of said Boston; Lillian M. Childs, of Gloucester, District of Massachusetts, as administratrix of the estate of Robert W. Childs, late of said Gloucester, and Richard Tobin, of said Gloucester, as administrator of the estate of William Tobin, late of said Boston, and ask to intervene as libellants in the libel of Hall *et al. v.* steamship Barnstable, No. 760, in the United States District Court for the District of Massachusetts, and thereupon the said petitioners allege and articulately propound as follows:

First. That said William Tobin, Robert W. Childs, John Clark, William Ackerman, Harvey Emernan and Crawford Menac were members of the crew of the late schooner Fortuna.

Second. That said Harold Emernan and James M. Anderson allege that by reason of said collision, and resulting therefrom, the said Harvey Emernan, of said Lunenburg, lost personal effects to the

amount of two hundred and fifty dollars ($250), and suffered injuries which resulted in his death, and that he should recover for pain and suffering resulting in his death, and for his death, the sum of three hundred and fifty dollars ($350).

Third. And said Levi Menac doth allege that by reason of said collision, and resulting therefrom, the said Crawford Menac, of said Port Medway, lost personal effects to the amount of two hundred and fifty dollars ($250), and suffered injuries which resulted in his death, and that he should recover for the pain and suffering resulting in his death, and for his death, the sum of three hundred and fifty dollars ($350).

Fourth. And said Minnie A. Ackerman doth allege that by reason of said collision, and resulting therefrom, the said William Ackerman of said Boston lost personal effect to the amount of two hundred and fifty ($250), and suffered injuries which resulted in his death, and that he should recover from the pain and suffering resulting in his death, and for his death, the sum of three hundred and fifty dollars ($350).

Fifth. And said Joseph Clark doth allege that by reason of said collision, and resulting therefrom, the said John Clark of said Boston, lost personal effects to the amount of two hundred and fifty dollars ($250), and suffered injuries which resulted in his death, and that he should recover for pain suffering resulting in his death, and for his death, the sum of three hundred and fifty dollars ($350).

Sixth. And said Lillian M. Childs doth allege that by reason of said collison, and resulting therefrom, the said Robert W. Childs, of said Boston, lost personal effects to the amount of two hundred and fifty dollars ($250), and suffered injuries which resulted in his death, and that he should recover for the pain and suffering resulting in his death, and for his death, the sum of three hundred and fifty dollars ($350).

Seventh. And said Richard Tobin doth allege that by reason of said collison, and resulting therefrom, the said William Tobin, of Boston, lost personal effects to the amount of two hundred and fifty dollars ($250), and suffered injuries which resulted in his death, and that he should recover for the pain and suffering resulting in his death, and for his death, the sum of three hundred and fifty dollars ($350).

Eighth. And said petitioners do further allege that the said collison was caused in the manner as stated in said libel, and that said steamship Barnstable was wholly at fault therefor.

Ninth. And said petitioners do further allege that the Turret Steamshipping Company, Limited, appeared in the above libel and claimed said steamship Barnstable and gave bond to release her, and said claimant filed a petition to bring in as a party respondent the Boston Fruit Company, alleging that it was the charterer of said steamship Barnstable, and in sole charge and control of her at the time of the collision.

And said petitioners therefore pray that said Boston Fruit Company shall be made a party respondent to this petition, and also in the original libel and intervening petition already on file, and that it shall be summoned to appear and answer to said libel and petitions and to answer to any decree that may be rendered against it in behalf of said libellants or either of said petitioners.

Tenth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

And your petitioners further pray that they may thus become parties to said libel by intervention, and that said libel may be so amended as to include them as libellants therein, and so as to include the Boston Fruit Company as a party respondent in said libel and said petitions, and that the stipulations given in said libel may be extended to cover the claims contained in this petition, and that a warrant may issue to the stipulators therein to show cause, if any, why said stipulations should not be so extended.

HAROLD EMERNAN,

by ADDISON C. BURNHAM, *his Attorney.*

CARVER & BLODGETT, *Proctors.*

COMMONWEALTH OF MASSACHUSETTS,

SUFFOLK, ss. BOSTON, Nov. 2, 1896.

Then personally appeared Addison C. Burnham, in behalf of said petitioners, and took oath that the above stated facts are true to the best of his knowledge and belief.

In witness whereof, I hereunto set my hand and notarial seal, on the day and year first above written.

[SEAL] STEPHEN R. JONES, *Notary Public.*

SUMMONS.

Thereupon, on said second day of November, A. D. 1896, by order of the judge, a summons issued, commanding the marshal to summons the said Boston Fruit Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, having a usual place of business at Boston in said district (if it might be found in his precinct), to appear before the District Court of the United States, to be holden at Boston, within and for the Massachusetts District, on the sixth day of November current, at ten o'clock, A. M., then and there to answer to a libel and intervening petitions. And to make due return of his doings into Court.

ACKNOWLEDGMENT OF SERVICE.

BOSTON, Nov. 2, 1896.

Service of the within is hereby accepted as legal and sufficient by the Boston Fruit Company.

BOSTON FRUIT COMPANY,
by its Proctors,
RUSSELL & RUSSELL.

On the sixth day of November, A. D. 1896, the following answer was filed in the clerk's office, viz: —

ANSWER OF TURRET STEAMSHIPPING COMPANY, LIMITED.

To Honorable THOMAS L. NELSON, *Judge of said Court:*

The Answer of the Turret Steamshipping Company, Limited, claimant of the steamship Barnstable, her machinery, tackle, apparel and furniture, to the libel of A. G. Hall *et al.*, and Arthur W. Nunan, against said steamship.

And not waiving the petition filed by said claimant in the above cause, and the claim that the Boston Fruit Company should be made party defendant and decreed to pay any and all damages, if any, for the losses and matters alleged in the libel, the claimant articulately answers the libel as follows:

First. The claimant is ignorant of the allegations in the first article of the libel, and leaves and will require the libellants to prove the same, if material.

Second. The claimant admits that a collision occurred sometime after seven o'clock in the evening of Jan. 13, 1896, between the fishing schooner Fortuna and the steamship Barnstable, and it denies all the other allegations in the second article of the libel, except as herein expressly admitted. And it alleges the circumstances of the collision to have been as follows: —

The night was dark but clear. The wind was about west northwest. The steamship was on a voyage from Port Antonio, Jamaica, to Boston with a cargo of fruit. She was back of Cape Cod off Highland Light, and proceeding on her course northwest by north: her proper lights were set and burning. The master and second mate had been on duty since six o'clock, P. M., and were on the bridge keeping a careful lookout and attentive to duty. A competent and vigilant lookout was properly stationed forward and attending to his duty, and a proper and efficient man was at the wheel. While so proceeding, and [illegible] every precaution and diligence to see and avoid approaching vessels, a green light on what afterwards proved to be the schooner Fortuna suddenly appeared off the port bow in close and dangerous proximity. The master of the steamship, to avoid the collision, if possible, or to ease the blow, immediately ordered the wheel put hard-a-port, and the order was immediately obeyed. He also signalled to stop the engine and the engine was stopped, but it was too late to avoid the collision. Almost immediately after the light was seen, the collision occurred, the steamship striking the schooner on the starboard a little aft of the foremast, glancing forward, and cutting into her. The schooner swung alongside, the engines were reversed, and some of the men from the schooner jumped on board the steamship. The schooner soon afterwards filled and sank and some of her men were lost. The steamship was not damaged.

Third. The claimant admits that the schooner put her wheel hard-a-starboard before the collision and swung to port, and the claimant alleges that if said schooner had kept her course, as by law required, or changed to starboard, the collision might have been avoided.

Fourth. The claimant denies the allegations in the fourth article of the libel, and on the contrary alleges that the collision was caused wholly by the fault of those in charge of said schooner, among other things:

1. In not having or showing the lights required by law, and especially in not having and showing seasonably a proper green light to the steamship as the vessels were approaching.

2. In not having and keeping a proper lookout and a proper and efficient officer on deck and in command.

3. In changing her course, as the vessels were approaching, by putting the wheel hard-a-starboard, and swinging to port.

4. In not displaying a torch or flare-up or other signal to the steamship as the vessels were approaching.

Fifth. The claimant denies the allegations in the fifth article of the libel, and on the contrary alleges that the collision was caused entirely by the fault and negligence of the schooner and those in charge of her. And said collision was not caused or contributed to in any degree by said steamship or those in charge of her navigation.

Sixth. The claimant is ignorant of the allegations in the sixth article of the libel, and in first and second articles of the intervening libel of Arthur W. Nunan, and it denies all said allegations, and it denies that said schooner was of the value of $11,000, or that her profits and provisions were of the value of $1,500, or that the personal effects of the master and crew were of the value of $4,000, or that all of them were lost. And it denies that said Nunan was injured or damaged to the amount of $5,000, or that he lost personal effects of the value of $100; and it will require the libellants to prove their damage if it becomes material.

Seventh. Further answering the said libel, and as a further and separate defence, the claimant refers to and here repeats the matters stated in said petition, praying that the Boston Fruit Company be made party defendant, and decreed to pay all damages, if any, for the losses and matters alleged in the libel, with the same force and effect as though here more particularly set forth.

Eighth. All and singular the premises are true.

Wherefore, the claimant prays that the libel may be dismissed with costs, or that the Court will make such other or different decree

as the justice of the cause presented herein, and under the said petition and answer thereto, may require.

CONVERS & KIRLIN,
Proctors for Claimant,
5 Beekman Street, New York.

SOUTHERN DISTRICT OF NEW YORK,
CITY AND COUNTY OF NEW YORK, ss.

E. B. CONVERS, being duly sworn, says that he is one of the proctors for the claimant herein, and that the foregoing answer is true according to his information and belief. He further says that the claimant is a foreign corporation, and all of its officers are absent from the United States.

E. B. CONVERS.

Sworn to before me this third day of August, 1896.
[SEAL] WILLIS B. DOWD,
Notary Public, New York County.

On said sixth day of November, A. D. 1896, the following answer was filed in the clerk's office, viz: —

ANSWER OF BOSTON FRUIT COMPANY TO PETITION OF TURRET STEAMSHIPPING COMPANY, LIMITED.

To Honorable THOMAS L. NELSON, *Judge of said Court:*

The answer of the Boston Fruit Company, a corporation duly established by law of the Commonwealth of Massachusetts, and located in Boston, in said District, to the petition of the Turret Steamshipping Company, Limited.

The said Boston Fruit Company articulately answers as follows:

First. It is a corporation duly established by law and located in Boston, in said Commonwealth and District of Massachusetts.

Second. It admits the allegations in the first, second and third articles of the petition.

Third. In answer to the fourth article of the petition the said Boston Fruit Company admits that it made and executed with R. Craggs & Sons, agents of owners, March 10, 1893, charter party or agreement, a copy of which is annexed to the petition marked "Exhibit C", in and by which it chartered two steamships for the

time and upon the terms and agreements provided in said charter party and it refers to said charter party for such terms and agreements. It admits that said steamship Barnstable was one of the two steamships referred to in said charter party, and at the time of said collison was, under said charter party, bound from Port Antonio, Jamaica, to Boston with fruit for said Boston Fruit Company.

Fourth. The Boston Fruit Company admits that the petitioner before the said collision had become the owner of said steamship and had acquired by assignment all the rights and interests of owner in said charter party, and had assumed all the liabilities and agreements therein provided, and said Boston Fruit Company had paid the agreed charter money to the petitioner and had recognized it as the assignee of said charter party, and the petitioner was bound by the terms and agreements therein.

Fifth. In answer to the sixth article of the petition, the Boston Fruit Company admits that said charter party contained Clause 2 as alleged, but it denies that the petitioner at the time of the collision was not in legal effect in possession or control of said steamship and had no agent or servant on board thereof; and on the contrary, the Boston Fruit Company alleges that by the terms and agreements in said charter party it was to pay the wages and provisions of the captain, officers, engineers, firemen and crew, their pay not to exceed that paid by the charterers in similar vessels; that the master, although appointed by charterers, was to be satisfactory to the owners; that the owners alone were, if called upon, to investigate charges made by charterers against the chief engineer, captain, officers and engineers, and alone could make a change in the appointments during the continuance of the charter party; that for any loss of time from collision, the payment of hire shall cease during such loss; that the owners should maintain the vessel in a thoroughly efficient state in hull and machinery for the service; that the owners shall pay for the insurance on the vessel, and the benefit of all derelicts and salvages as well as the loss of time and other expenses attendant thereon should be for account of owners and charterers equally. And the Boston Fruit Company alleges that by these and other terms and provisions in said charter party, the said company

did not assume liability or become liable for damage done by collision by said steamship, and that said steamship alone was liable therefor in a proceeding *in rem*, and it denies that it is liable for the acts or negligence, if any, of the master, officers, engineers or crew of said steamship for the matters and losses alleged in the libel and in the petition.

Sixth. In answer to the seventh article of the petition, the Boston Fruit Company denies that the petitioner had no agent, officer or servant on board said steamship at the time of the collision, and on the contrary alleges that the master and officers of said steamship were in legal effect, under the terms of said charter party, the agents and servants of said steamship and her owners, and said steamship and owners were alone liable for any negligence or default in the navigation of said steamship. And not waiving the above claim and denial, the Boston Fruit Company admits that the circumstances of the collision were as alleged in the petition, and that said collision was caused wholly by the negligence and fault of those in charge of the navigation of said schooner Fortuna, as alleged and specified in the petition, and said collision was not in any manner caused or contributed to by said steamship or those in charge of her navigation. And the Boston Fruit Company denies that the persons on said steamship, charged by the libel with fault, were its agents or servants, or that as charterer of said steamship it can or should be held liable therefor, if any such fault be proven.

Seventh. The Boston Fruit Company admits the allegations in the eighth article of the petition. Wherefore, the Boston Fruit Company prays that the petition may be dismissed with costs.

BOSTON FRUIT COMPANY,
A. W. PRESTON, *Manager.*

RUSSELL & RUSSELL, *Proctors.*

Subscribed and sworn to before me,

[SEAL] CHAS. THEO. RUSSELL, *Notary Public.*

On said sixth day of November, A. D. 1896, the following answer was filed in the clerk's office, viz:—

ANSWER OF BOSTON FRUIT COMPANY TO PETITION OF HAROLD EMERNAN ET AL.

To the Honorable THOMAS L. NELSON, *Judge of said Court:*

The Answer of the Boston Fruit Company to the petition of Harold Emernan and others, intervening for their alleged interests and that of their intestates in the above-entitled libel and cause.

This respondent articulately answers and alleges as follows:

First. It is a corporation duly established by the laws of the Commonwealth of Massachusetts, and located in Boston in said district.

Second. It is ignorant of the matters alleged in the first, second, third, fourth, fifth, sixth and seventh articles of the petition, and will require the petitioners to prove the same, if material.

Third. It admits that a collision occurred on Jan. 13, 1896, between the fishing schooner Fortuna and the steamship Barnstable, and it alleges that the circumstances of the collision are correctly stated in the answer of the Turret Steamshipping Company to the libel in this cause; and it denies the allegations in the eighth article of the petition, that the steamship Barnstable was in fault therefor; and on the contrary it alleges that the collision was caused wholly by the fault and negligence of those in charge of the navigation of said schooner.

Fourth. It admits the allegations in the ninth article of the petition, and it alleges that it is not liable for the losses and matters alleged in the petition and libel, and should not be made a party thereto, for the reasons and upon the facts alleged in the answer of the said Boston Fruit Company to the petition of the Turret Steamshipping Company in said cause.

Wherefore, the Boston Fruit Company prays that the petition of said Harold Emernan and others may be dismissed as against it, with costs.

BOSTON FRUIT CO.,
A. W. PRESTON, *Manager.*

RUSSELL & RUSSELL, *Proctors.*

Subscribed and sworn to before me,

[SEAL] CHAS. THEO. RUSSELL, *Notary Public.*

From said September Term, A. D. 1896, this libel was continued from term to term to the March Term thereof, A. D. 1897, when, on the twenty-second day of March, A. D. 1897, the following petition was filed in the clerk's office, viz: —

PETITION OF ISRAEL B. STEWART.

To the Honorable THOMAS L. NELSON, *Judge of the District Court of the United States, within and for the District of Massachusetts:*

And now comes Israel B. Stewart, county of Lunenburg, Nova Scotia, as administrator of the estate of John Thomas Stewart, late of said Lunenburg, and asks to intervene as libellants in the libel of Hall *et al. v.* steamship Barnstable, No. 760, in the United States District Court for the District of Massachusetts; and thereupon the said petitioner alleges and articulately propounds as follows: —

First. That the said John Thomas Stewart was a member of the crew of the late schooner Fortuna.

Second. That the said Israel B. Stewart alleges that by reason of said collision, and resulting therefrom, the said John Thomas Stewart, of said Lunenburg, lost personal effects to the amount of two hundred and fifty dollars ($250), and suffered injuries which resulted in his death, and that he should recover for pain and suffering which resulted in his death, and for his death, the sum of three hundred and fifty dollars ($350).

Third. And said petitioner does further allege that the said collision was caused in the manner as stated in said libel, and that said steamship Barnstable was wholly at fault therefor.

Fourth. And said petitioner does further allege that the Turret Steamshipping Company, Limited, appeared in the above libel and claimed said steamship Barnstable and gave bond to release her, and said claimant filed a petition to bring in as a party respondent the Boston Fruit Company, alleging that it was the charterer of said steamship Barnstable, and in sole charge and control of her at the time of the collision.

And said petitioner therefore prays that said Boston Fruit Company shall be made a party respondent to this petition, and also in the original libel and intervening petitions already on file, and that it shall be summoned to appear and answer to said libel and peti-

tions, and to answer to any decree that may be rendered against it in behalf of said libellants or either of said petitions.

Fifth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

And your petitioner further prays that he may thus become a party to said libel by intervention, and that said libel may be so amended as to include him as libellant therein, and so as to include the Boston Fruit Company as a party respondent in said libel and said petitions; and that the stipulations given in said libel may be extended to cover the claims contained in this petition, and that a warrant may issue to the stipulators therein to show cause, if any, why said stipulations should not be so extended.

ISRAEL B. STEWART,
Adm'r Estate JOHN T. STEWART,
by L. R. CRAWFORD, *Attorney.*

CARVER & BLODGETT, *Proctors.*

COMMONWEALTH OF MASSACHUSETTS,
SUFFOLK, ss. BOSTON, March 22, 1897.

Then personally appeared L. R. Crawford, in behalf of said petitioner, and took oath that the above statement of facts by him subscribed are true to the best of his knowledge and belief.

In witness whereof, I hereunto set my hand and affix my notarial seal the day and year first above written.

[SEAL] EDWARD E. BLODGETT, *Notary Public.*

On the twelfth day of May, A. D. 1897, the following answer was filed in the clerk's office, viz: —

ANSWER OF TURRET STEAMSHIPPING COMPANY, LIMITED, TO PETITION OF HAROLD EMERNAN ET AL.

To the Honorable THOMAS L. NELSON, *United States District Judge for the District of Massachusetts:*

The Answer of the Turret Steamshipping Company, Limited, claimant of the steamship Barnstable, to the petition of Harold Emernan and James M. Anderson, as administrators of the estate of Harvey Emernan; Levi Menac, as administrator of the estate of Crawford Menac; Minnie A. Ackerman, as administratrix of the

estate of William Ackerman; Joseph Clark, as administrator of the estate of John Clark; Lillian M. Childs, as administratrix of the estate of Robert W. Childs, and Richard Tobin, as administrator of the estate of William Tobin, praying to intervene as libellants in the libel of A. G. Hall *et al.* against the steamship Barnstable, No. 760, in the United States District Court for the District of Massachusetts, alleges as follows:

First. It denies any knowledge or information sufficient to form a belief as to the matters alleged in the first article of said petition.

Second. It denies any knowledge or information sufficient to form a belief as to the matters alleged in the second article of said petition, except it denies that any sum should be recovered for the alleged pain, suffering and death of said Harvey Emernan.

Third. It denies any knowledge or information sufficient to form a belief as to the matters alleged in the third article of said petition, except it denies that any sum should be recovered for the alleged pain, suffering and death of said Crawford Menac.

Fourth. It denies any knowledge or information sufficient to form a belief as to the matters alleged in the fourth article of said petition, except it denies that any sum should be recovered for the alleged pain, suffering and death of said William Ackerman.

Fifth. It denies any knowledge or information sufficient to form a belief as to the matters alleged in the fifth article of said petition, except it denies that any sum should be recovered for the alleged pain, suffering and death of said John Clark.

Sixth. It denies any knowledge or information sufficient to form a belief as to the matters alleged in the sixth article of said petition, except it denies that any sum should be recovered for the alleged pain, suffering and death of said Robert W. Childs.

Seventh. It denies any knowledge or information sufficient to form a belief as to the matters alleged in the seventh article of said petition, except it denies that any sum should be recovered for the alleged pain, suffering and death of said William Tobin.

Eighth. It denies the matters alleged in the eighth article of the said petition.

Ninth. It admits the matters alleged in the ninth article of said petition.

Tenth. It denies the truth of the premises of said petition, but it admits the jurisdiction of this Honorable Court.

Eleventh. Further answering said petition, and for a further and separate defence, the Turret Steamshipping Company, Limited, claimant of the steamship Barnstable, alleges that said collision was caused by the negligence of those in charge of the schooner Fortuna, and that if the said collision was caused or contributed to in any way by the negligence of those in charge of the Barnstable, which is not admitted, that such negligence was the negligence of the Boston Fruit Company, whose servants were in full charge and control of the said steamship at the time of the collision, and not the negligence of this claimant: and the claimant refers to, and here repeats, with the same force and effect as if herein specifically set forth, all the matters stated in the said petition of the Turret Steamshipping Company, Limited, in the suit of A. G. Hall *et al.* against the steamship Barnstable, praying that the said Boston Fruit Company be made party defendant and decreed to pay all damages, if any, for the losses and matters alleged in the libel of A. G. Hall *et al.* against the said vessel, and the claimant avers that the facts and circumstances of said collision are therein correctly set forth.

Twelfth. All and singular the premises of this answer are true.

Wherefore the claimant prays that said petition may be dismissed with costs, or that the Court will make such other or different decree as the justice of the cause presented herein under the said petition and answer thereto may require.

CONVERS & KIRLIN,
Proctors for Claimant.

SOUTHERN DISTRICT OF NEW YORK,
CITY AND COUNTY OF NEW YORK, ss.

E. B. Convers, being duly sworn, says that he is one of the Proctors for the claimant herein, and that the foregoing answer is true according to his information and belief, derived from statements made by the claimant's witnesses. He further says that the claimant is a foreign corporation, and all of its officers are absent from the United States. E. B. CONVERS.

Sworn to before me this eleventh day of May, 1897.

[SEAL] FREDERICK GREEN,
Notary Public, New York County.

On said twelfth day of May, A. D. 1897, the following answer was filed in the clerk's office, viz: —

ANSWER OF TURRET STEAMSHIPPING COMPANY, LIMITED, TO PETITION OF I. B. STEWART.

To the Honorable THOMAS L. NELSON, *United States District Judge for the District of Massachusetts:*

The Answer of the Turret Steamshipping Company, Limited, claimant of the steamship Barnstable, to the petition of Israel B. Stewart, as administrator of the estate of John Thomas Stewart, praying to intervene as libellant in the libel of A. G. Hall *et al.* against the steamship Barnstable, No. 760, in the United States District Court for the District of Massachusetts, alleges as follows:

First. It denies any knowledge or information sufficient to form a belief as to the matters alleged in the first article of said petition.

Second. It denies any knowledge or information sufficient to form a belief as to the matters alleged in the second article of said petition, except it denies that neither $350 nor any sum should be recovered for the alleged pain, suffering and death of said John Thomas Stewart.

Third. It denies the matters alleged in the third article of said petition.

Fourth. It admits the matters alleged in the fourth article of said petition.

Fifth. It denies the truth of the premises of said petition, but it admits the jurisdiction of this Honorable Court.

Sixth. Further answering said petition, and for a further and separate defence, the Turret Steamshipping Company, Limited, claimant of the steamship Barnstable, alleges that said collision was caused by the negligence of those in charge of the schooner Fortuna, and that if the said collision was caused or contributed to in any way by the negligence of those in charge of the Barnstable, which is not admitted, that such negligence was the negligence of the Boston Fruit Company, whose servants were in full charge and control of the said steamship at the time of the collision, and not the negligence of this claimant; and the claimant refers to, and here repeats, with the same force and effect as if herein specifically set forth, all

the matters stated in the said petition of the Turret Steamshipping Company, Limited, in the suit of A. G. Hall *et al.* against the steamship Barnstable, praying that the said Boston Fruit Company be made party defendant and decreed to pay all damages, if any, for the losses and matters alleged in the libel of A. G. Hall *et al.* against the said vessel; and the claimant avers that the facts and circumstances of said collision are therein correctly set forth.

Seventh. All and singular the premises of this answer are true.

Wherefore the claimant prays that said petition may be dismissed with costs, or that the Court will make such other or different decree as the justice of the cause presented herein, under the said petition and answer thereto, may require.

CONVERS & KIRLIN,
Proctors for Claimant.

SOUTHERN DISTRICT OF NEW YORK,
CITY AND COUNTY OF NEW YORK, ss.

E. B. Convers, being duly sworn, says that he is one of the Proctors for the claimant herein, and that the foregoing answer is true according to his information and belief, derived from statements made by the claimant's witnesses. He further says that the claimant is a foreign corporation, and all of its officers are absent from the United States.

E. B. CONVERS.

Sworn to before me this eleventh day of May, 1897.

[SEAL] FREDERICK GREEN,
Notary Public, New York County.

On said twelfth day of May, A. D. 1897, the following agreement was filed in the clerk's office, viz: —

UNITED STATES DISTRICT COURT,
DISTRICT OF MASSACHUSETTS.

HALL ET AL., *Libellants*,

v.

THE STEAMSHIP BARNSTABLE, TURRET STEAMSHIPPING COMPANY, LIMITED, CLAIMANT, AND THE BOSTON FRUIT COMPANY, RESPONDENT.

NUNAN ET AL., INTERVENING LIBELLANTS, *v.* SAME.

PETITION OF THE TURRET STEAMSHIPPING COMPANY, LIMITED,

v.

BOSTON FRUIT COMPANY.

AGREEMENT FOR DAMAGES TO LIBELLANTS AND PETITIONERS.

In the above entitled cases it is hereby agreed that the value of the property of the libellants and intervening libellants destroyed, and the amount of damage suffered by them by reason of the collision set forth in said libel, are as follows:

A. G. Hall *et al.*,	Value Schooner Fortuna . .	$10,000.00
A. G. Hall *et al.*,	Value outfits and gear Schooner Fortuna	1,100.00
John W. Greenlaw,	value outfits and personal effects Fortuna	1,072.00
Victor Sampson,	value personal effects . . .	100.00
Thomas McGuire,	" " " . . .	140.00
Michael Dunphy,	" " " . . .	115.00
Michael Hearsey,	" " " . . .	168.00
Harding Paul,	" " " . . .	113.00
John Malcolm,	" " " . . .	140.00
Robert Hayes,	" " " . . .	115.00
Fred Lawrence,	" " " . . .	123.00
James D. Goodwin,	" " " . . .	100.00
William Feener,	" " " . . .	68.00

Ernest Cross, value personal effects . . .	$101	
and personal injuries . . .		$300.00
John Hayward, value personal effects . . .	150	
and personal injuries . . .		150.00
Arthur W. Nunan, value personal effects . .	95	
and personal injuries . . .		2000.00
Harold Emernan *et al.*, Admrs. Estate of Harvey Emernan, personal effects . . .	125	
and personal injuries . . .		350.00
Levi Menac, Admr. Estate of Crawford Menac, personal effects	125	
and personal injuries, . . .		350.00
Minnie C. Ackerman, Admx. Estate of William Ackerman, personal effects . .	125	
and personal injuries . . .		350.00
Joseph Clark, Admr. Estate of John Clark, personal effects	125	
and personal injuries . . .		350.00
Lillian M. Childs, Admx. Estate of Robert W. Childs, personal effects . . .	125	
and personal injuries . . .		350.00
Richard Tobin, Admr. Estate of William Tobin, personal effects	125	
and personal injuries . . .		350.00
Israel B. Stewart, Admr. Estate of John T. Stewart, personal effects	125	
and personal injuries . . .		350.00
		1221.00
Total		$19,475.00

with interest from Jan. 1, 1897, at 6% per annum.

CARVER & BLODGETT,
Proctors for Libellants and Intervening Libellants.

CONVERS & KIRLIN,
Proctors for owners Steamship Barnstable.

RUSSELL & RUSSELL,
Proctors for Boston Fruit Company.

On said twelfth day of May, A. D. 1897, the following stipulation was filed in the clerk's office, viz:—

STIPULATION REGARDING FACTS.

In the above-entitled cause it is stipulated and agreed by and between the Turret Steamshipping Company (Limited), claimant and owner of the steamship Barnstable, and the Boston Fruit Company, charterers, as follows:

First. The collision alleged in the pleadings in the above-entitled cause was caused by the fault and neglect of those in charge of the navigation of the steamship Barnstable at the time, and was not caused or contributed to by the engineer of said steamship, nor by those in charge of the navigation of the libellants' schooner Fortuna; but this admission is made without prejudice to and without intent to waive any of the contentions of either of the parties hereto regarding the liability of either as against the other, as set forth in the petition of said Turret Steamship Company (Limited), and the answer of said Boston Fruit Company thereto.

Second. The master, officers, engineers, firemen and crew of the Barnstable at the time of the collision had been appointed by the Boston Fruit Company, and were paid by it under and pursuant to the charter party referred to in said petition.

Third. The said steamship Barnstable had been engaged under the charter party, a copy of which is attached to the said petition, for more than six months before said collision.

Fourth. No complaint was ever made by either party under clause eleven of said charter party.

Fifth. There was no compulsory pilot on board said steamship at the time of the collision.

Sixth. The collision was caused by the negligence of master, mates or crew at the time in charge of the navigation of the steamship.

Seventh. The master, mate, engineers, firemen and crew, appointed as provided in said charter party, were the only persons at the time in charge of the navigation of the said steamship and responsible therefor.

Eighth. It is further agreed (subject to objection, that the fact is immaterial and the evidence incompetent) that the Boston Fruit Company had no insurance upon said steamship, and the petitioner, the then owner, carried a line of insurance on the vessel against sea perils, including collisions, but not for the full value of the vessel, the owner being in part uninsured.

APRIL 13, 1897.

CONVERS & KIRLIN,
Proctors for TURRET STEAMSHIPPING COMPANY,
Claimant and Petitioner.
RUSSELL & RUSSELL,
Proctors for BOSTON FRUIT COMPANY.

UNITED STATES DISTRICT COURT,
DISTRICT OF MASSACHUSETTS.

A. G. HALL ET AL., *Libellants,*
v.
THE STEAMSHIP BARNSTABLE, ETC., *Claimant.*

IN THE MATTER OF THE PETITION OF THE TURRET STEAMSHIPPING COMPANY *v.* THE BOSTON FRUIT COMPANY.

DEPOSITION OF WILLIAM H. BENNETT TAKEN ON BEHALF OF THE BOSTON FRUIT COMPANY.

NEW YORK, March 18, 1897, 11 o'clock, A M.

PRESENT: C. T. RUSSELL, Esq., *for the* BOSTON FRUIT COMPANY; Messrs. CONVERS & KIRLIN (*by* Mr. KIRLIN), *for the Petitioner.*

In the above-entitled cause it is stipulated that the deposition of William H. Bennett may be taken at the office of Messrs. Convers & Kirlin, New York, on the eighteenth day of March, 1897, at 11 o'clock, A. M., by consent of parties; that notice of the taking is waived; that the deposition may be taken by a stenographer; that signing, filing and certification are waived; the petitioner reserving all objections to the relevancy or competency of the evidence.

DEPOSITION OF WILLIAM H. BENNETT.

William H. Bennett, called on behalf of the Boston Fruit Company, being duly sworn, testifies as follows:

Direct Examination by Mr. RUSSELL.

Q. 1. Captain, what is your name and residence? *A.* William H. Bennett; New York.

Q. 2. What is your occupation? *A.* Steamship agent and broker.

Q. 3. How long have you been a steamship agent and broker? *A.* Since 1885.

Q. 4. In 1893, what was your business? *A.* Steamship agent and broker.

Q. 5. Were you connected as a partner in any firm? *A.* As a partner of the firm of W. W. Hurlbut & Company.

Q. 6. How long had you been connected with that firm? *A.* Since 1886 or 1887.

Q. 7. What was their business? *A.* Steamship agents and brokers.

Q. 8. Were they or not engaged in negotiating charter parties with various steamers? *A.* That was their business.

Q. 9. What was the extent of their business? *A.* They made a specialty of time charters, the purchase and sale of steamers; probably did the bulk of that business on this side of the water.

Q. 10. And what personally did you have to do with it? *A.* As an active partner in the concern.

Q. 11. And actively engaged in negotiating these charter parties? *A.* Yes.

Q. 12. And what, in general, was the extent of their business in chartering vessels? *A.* In time charters, the purchase and selling and construction of steamers, I presume they did the bulk of that business on this side of the water.

Q. 12½. Did or did not the firm prepare the forms of charters used in these negotiations? *A.* I generally prepared the forms of charters.

Q. 13. Did you or not have anything to do with the charter of the steamship Barnstable in 1893? *A.* I negotiated it for the owners and charterers as broker.

Q. 14. With whom did you negotiate it? *A.* With R. Craggs & Sons, shipbuilders and owners of vessels — contracted for it.

Q. 15. You represented them? *A.* I presume I represented both sides as broker.

Q. 16. Who were the charterers? *A.* The Boston Fruit Company.

Q. 17. Have you got a copy of the charter party you then negotiated? *A.* Yes.

Q. 18. Will you produce it? [*Witness produces a paper. Said copy of charter party produced by the witness is marked for identification. "Exhibit A*, March* 18, 1897, *E. H. C., Sten".*]

Q. 19. Where is the original charter party? *A.* On file in our office.

Q. 20. At the time of the negotiation of that charter party did you or not have any conversation with any of the owners? *A.* I had a great many conversations with them.

Q. 21. Please give them. *A.* The first was with Mr. Ernest Craggs in New York; and with his father (I think his name is R. Craggs) at his office in London; and also with Ernest Craggs and his father at their ship yards and offices in Middlesbrough.

Q. 22. Taking the first conversation with Mr. Ernest Craggs, where was that in New York? *A.* At our offices in New York.

Mr. KIRLIN. I object to all conversations prior to the signature of the charter as immaterial, irrelevant and incompetent, and inadmissible to explain the writing. I desire this objection to apply to all questions concerning conversations about the charter.

Q. 23. When did you have any conversation with Mr. Ernest Craggs? *A.* Sometime in New York previous to March, 1893,—I think September, 1892.

Q. 24. What was that conversation about? *A.* I told him in a

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* This Exhibit A is annexed to this deposition, but I omit the printing of it as it is the same as the Time Charter, Exhibit C, printed on pages 14 to 18.

JOHN G. STETSON, *Clerk.*

general way that we wanted two steamers. I then went on to London, and closed the contract practically.

Q. 25. Please state the circumstances under which you closed the contract in London. *A.* The Boston Fruit Company had given me authority to pay a certain price — on this very usual form of charter. I drew up one in pencil; left some blank forms with my correspondents in London. They sent the charter out to me to sign. I returned it with the signature of the Boston Fruit Company — at least, I returned them copies after the Boston Fruit Company had signed it in the usual way.

Q. 26. When did you meet Mr. Craggs in London? *A.* Several times. I think in October, November, and early December, 1892.

Q. 27. Did you have any conversation with him in regard to the charter party? *A.* We continually were talking about the charter party and the ships, and the clauses and stipulations in it, and the price.

Q. 28. Who drafted the charter party? *A.* I drafted the charter party.

Q. 29. Is it in accordance with any regular form, or is it original with you? *A.* It is a form adapted by me from the old English form of net charter, and altered to meet the requirements of the American trade.

Q. 30. What do you mean by net charter? *A.* On the net charter the charterer pays for crew and provisions. On the ordinary time charter, or admiralty form, as we call it, the owner pays for crew and provisions.

Q. 31. Did you have any conversation with Mr. Craggs in regard to the insurance clause? [*Same objection.*]

Q. 32. Clause No. 32. [*Same objection.*] *A.* I did.

Q. 33. At whose suggestion was that clause inserted in the charter party? *A.* I inserted it in the charter party.

Q. 34. And for what purpose? *A.* To show that the owners paid for all insurance on the vessel.

Q. 35. And what is included in the insurance on the vessel? [*Same objection.*] *A.* The same as in all forms of time charter; the owner pays for the insurance on the vessel against stranding, collision, etc., as usual.

Q. 36. Did you have any conversation with Mr. Craggs in regard to that clause? *A.* I did; several.

Q. 37. Please state the substance of that conversation. [*Same objection.*] *A.* I told him that he would have to insure for his vessel, the same as the charter party stated.

Q. 38. Did he make any reply? [*Same objection.*] *A.* Of course I told him if he did not want to insure he could take that risk. But his intention was to insure.

Q. 39. Do you know whether, in fact, he did insure? *A.* I don't know of my own knowledge.

Q. 40. In clause 11 of the charter party who added the written words? *A.* In the charter party that I drafted I wrote those words in.

Q. 41. And under what circumstances? *A.* Simply because Mr. Craggs wished the usual right to have the power to discharge captain or officers if it did not suit his interests to have them in; in other words if they were objectionable, did not attend to their business, got drunk, or prejudiced the interest of the ship in any way, that he had power to remove them and have others appointed.

Q. 42. And he requested the insertion of that provision, did he? *A.* He did. And I suggested it to him for his protection.

Q. 43. And the words were added to the printed form? *A.* The words were added to the printed form.

Cross Examination by Mr. KIRLIN.

×-*Q.* 44. Captain Bennett, I notice you do not mention any cases within your experience where you have ever had occasion to deal with this clause 22 about insurance. Have you ever had any such cases? *A.* I think that I have chartered all the boats to my knowledge on this side of the water on that form.

×-*Q.* 45. Isn't that a universal form in net-form time charters? *A.* No.

×-*Q.* 46. Do you know the English government form when you see it? *A.* I know the English government form; but they don't put it in as explicit as I put that clause in.

×-*Q.* 47. Do you know the English government form when you see it, is the question. *A.* The English form has been so altered

and varied in the last ten years that I don't think that there are six copies in existence.

×-*Q.* 48. [*Paper shown witness.*] Please look at the document which I show you, marked "government form of charter party", which by a note at the foot purports to be sold by her Majesty's Official Agency for Customs forms, 6 Harp Lane, London, and see if you recognize that as the government form which you have spoken about. *A.* It is not the government form in use on this side of the water.

×-*Q.* 49. What do you mean by "government form on this side of the water"? What government? *A.* Because —

×-*Q.* 50. What government? *A.* It is not the English government form in use on this side of the water known to us as the admiralty form, because every broker alters the form to suit himself.

×-*Q.* 51. Do you recognize this as the original form — *A.* (*interrupting*) I do not.

×-*Q.* 52 (*continuing*). — from which you get the expression "government form of charter party"? *A.* If this charter is in use I have never seen a charter party made under it on this side of the water. [*Said paper is marked* "Petitioner's Exhibit 1 for identification, March 18, 1897".]

×-*Q.* 53. Did you ever see an English form? *A.* That is the gross form — not the net form that you showed me; that is the admiralty form, not the net form of charter on which these boats are chartered.

×-*Q.* 54. Your clause in regard to insurance provides "That the owners shall pay for the insurance on the vessel" — clause 22. Do you notice that this government form that I show you, which is marked "Petitioner's Exhibit 1 for identification", has the clause in the same words: "shall pay for the insurance on the vessel"? *A.* "Etc."

×-*Q.* 55. Well, that is all there is about insurance, isn't it? *A.* No.

×-*Q.* 56. What else do you see there about insurance? *A.* That the owner shall pay for the insurance on the vessel; but in the charter party that I drew the owner shall pay for *all* insurance on the vessel. In order to show —

×-*Q.* 57. Just look at the clause in the copy which is marked "Exhibit A", and see if it does not say "the owners shall pay for *the* insurance"? *A.* That the owners shall pay for the insurance.

×-*Q.* 58. *The* insurance on the vessel? *A.* That was put in to specify as briefly as they could that the owners should pay for insurance.

×-*Q.* 59. I have not asked you about that. Look at this English form, and see if it is not in the same words: "shall pay for *the* insurance." *A.* Yes. It is in all charter parties more or less in different ways — that is, all forms of time charter.

[*The question put to the witness on page* 42, "Isn't that a universal form in net-form time charters?" *is now referred back to and read, and is put to the witness in the following form:*]

×-*Q.* 60. Isn't that insurance clause a universal form in net-form time charters? *A.* That is a different question. The insurance clause in all forms of time charter that I know of varies a little as expressed.

×-*Q.* 61. Isn't it generally limited to these words: "the owners shall pay for the insurance of" — or "on — the vessel"? *A.* In almost all forms of the admiralty form it is put in in some such way, to signify the owner shall pay for all insurance on the vessel or appertaining to it.

×-*Q.* 62. Now you are adding a new element. Have you ever seen the clause "or appertaining to it"? *A.* Yes.

×-*Q.* 63. In any American form? *A.* They have it and have used it where the insurance on the vessel has taken the risk in coals in the bunkers on commission, and various other things.

×-*Q.* 64. You have had no experience, I understand you, of the actual working out of this clause in any particular cases? *A.* I have had a good deal of experience in various insurance claims — so much so that I clearly expressed to the owner that he would have to pay for all insurance on the vessel in any way, shape and manner against stranding, collision and everything, as is usually done in all vessels, unless he wanted to take the risk and not insure.

×-*Q.* 65. Tell us what experience you have actually had of these insurance clauses, or the working out of them. *A.* I have never known an owner to insure a charter for damage by collisions before. He has always taken that risk.

×-*Q.* 66. Name a case to me within your experience in which the question has arisen prior to this. *A.* There has never been a case to my knowledge in which an owner sought to recover from the charterer any damage done to the vessel by collision.

×-*Q.* 67. Can you name a case in your experience where it has ever arisen before, or where there have ever been any facts upon which such a controversy could arise? *A.* We have had hundreds of steamers that have been ashore, or in collision with other vessels, in which no claim has been made on the charterers.

×-*Q.* 68. Mention a name or two. *A.* A name or two of the steamers?

×-*Q.* 69. Yes. *A.* Do you wish to go into that very fully?

×-*Q.* 70. Yes; in the net form. *A.* Net form. The Ethelred and Ethelwold, on this form, have been ashore; they have been in collision at various times; and the managing owner, Mr. John Colvils, has paid the insurance on all claims; and he told me personally that he had no grounds for claim against the owners.

Mr. RUSSELL. Against the charterers, you mean?

WITNESS. Against the charterers. The Carib Prince and the Creole Prince (you know them); I had several cases in which they made no claim against the charterers.

×-*Q.* 71. And in which no claim was sustained against the vessels, weren't they? *A.* And in which no claim was sustained against the vessels. The vessels were damaged.

×-*Q.* 72. Damaged by what? *A.* I don't know whether the owners collected from the insurance, or whether they were insured or not.

×-*Q.* 73. Damaged by what? *A.* In various ways. By lighters or steamers or wharves being in collision with them, or by stranding. The Ethelred and the Ethelwold. I had some ten or twelve insurance matters since that have been on this former charter, and in no case has the charterer been asked or expected; and the owner clearly said to me he had insured against collision and everything else. I have never known of the case of an owner making a claim on the charterer for any damage caused by collision, or stranding, or anything else, as he knows very well he has got to insure or take the risk to the steamer or for any damage the steamer does.

×-*Q.* 74. Do you see anything there that requires the owner to insure? *A.* Yes; clause 22. It says that the owner shall pay for the insurance of the vessel.

×-*Q.* 75. Does it say he shall effect it? *A.* The charterers don't care. He can effect it where he likes, or take the risk when he likes.

×-*Q.* 76. Suppose he does not insure. *A.* That is his risk.

×-*Q.* 77. Do you see anything to that effect in the clause? *A.* Not at all. The clause is put in as briefly as it is possible to show that the owner pays the insurance of the vessel. If the charterers care to insure their cargo, that is their lookout.

Mr. RUSSELL. Not cargo; vessel.

WITNESS. I say, if the charterers don't care to insure the cargo of the ship — in other words, if the charterers don't care to insure they take their risk. The owners have nothing to do with it — any more than the charterers have with insuring the vessel.

×-*Q.* 78. You recognize this as a demised charter? *A.* Explain what you mean.

×-*Q.* 79. A charter in which the vessel is virtually turned over to the charterers during the period of charter. *A.* They are virtually time charterers — time charterers to the extent that they don't pay for the vessel, neither do they pay for insurance, nor for crew, except that which is specified.

×-*Q.* 80. Do you know actually whether they do or do not? *A.* The charter party expresses it.

×-*Q.* 81. Do you know about the fact? *A.* What?

×-*Q.* 82. Whether the charterer does insure the vessel, or insure the hull, against risks? *A.* I know very well the charterer does not insure the vessel.

×-*Q.* 83. Do you know that is the case of your own knowledge? *A.* Of my own knowledge?

×-*Q.* 84. Yes. *A.* I have never heard of them insuring any vessels. I don't see why they should, in that form of charter.

×-*Q.* 85. When has this matter first come to your attention as a practical matter, Mr. Bennett? *A.* I really think the first time I ever heard of the claim was from you personally.

×-*Q.* 86. You never heard of the question being suggested

before, have you? *A.* Never before. No question has ever to my knowledge —

×-*Q.* 87. Until this case arose? *A.* Until this case arose.

×-*Q.* 88. And the matter was therefore never present to your mind before that as a mooted question? *A.* It has always been understood by charterers and by owners that the owners pay all insurance on vessels under time charters. It is so stipulated in the charter parties, and so understood by both.

×-*Q.* 89. That is what you say, but you do not mention any cases in which this actually came up as a practical matter. *A.* Because I, as a broker, where I charter a vessel on time, will very often try to make a brokerage by effecting insurance on a vessel. And I, as a shareholder in a steamer, and that steamer on time, will insure my share of that vessel, either direct or through the managing owner, for all risk of stranding, collision, or anything else.

×-*Q.* 90. Don't you know that when it is intended that the charterer shall have the benefit of insurance, it is so specified in the charter parties? *A.* It is specified in this charter that the owner shall pay for the insurance on the vessel.

×-*Q.* 91. Yes; but that is a different matter from the matter that we have on hand at present? *A.* I don't see it.

×-*Q.* 92. Let me ask the question again. Don't you know that when it is intended that the owner shall insure the vessel and give the charterer the benefit of it, in any case where the charterer might otherwise be liable, that that is so distinctly provided in the charter party? *A.* I can't quite understand what you mean. I know that no charterer will take a vessel if he had to insure her.

×-*Q.* 93. Now, that is pretty plain. Haven't you seen forms of charter in which there are specific provisions that the charterer shall have the benefit of the owner's insurance on the vessel? *A.* I don't see what the charterer has got to do with the owner insuring the vessel.

×-*Q.* 94. Be good enough to answer the question. *A.* I can't understand your question. I tell you that frankly.

×-*Q.* 95. Have you not had vessels under your control, or whose business has passed through your office, in which there have been provisions as to who should have the benefit of insurance that

the owners make on the vessel? *A.* I have never seen a charter passed through our office, or any other office, in which the charterer insured the vessel or got any benefits from insuring the vessel, whether made by the owners or anybody else.

×-*Q.* 96. And you think this clause is not intended to give the charterer the benefit of insurance on the vessel? *A.* I think that clause — I know that that clause — is clearly intended that the owners take the risk of insuring their vessel, and that the charterer has nothing to do with it.

×-*Q.* 97. It is not for his benefit at all? *A.* The charterer does not care whether the vessel is insured or not.

×-*Q.* 98. It never enters his mind? *A.* It never enters his mind.

×-*Q.* 99. That he may have any question about it? *A.* He never asks the question. It does not concern him.

×-*Q.* 100. And therefore the intention is that the owner shall insure the vessel for his own benefit? *A.* The intention is clearly that if the owner insures the vessel he must pay for the insurance, not the charterer.

×-*Q.* 101. Well, under this charter party the charterers' servants, or at least the charterers' officers, are in command of the navigation, are they not? *A.* The charterers' officers and captain are appointed by the charterers, with the owner having the power to dismiss them at any time should they prove detrimental to his interests or the interests of the vessel, or negligent in their duties.

×-*Q.* 102. Read me anything in the charter party which gives them that power. *A.* Clause 11 says: "If the charterers shall have reason to be dissatisfied with the conduct of the chief engineer during first six months, the owner shall, on receiving particulars of the complaint, investigate the same, and, if called upon, make a change in the appointments when the steamer is in". The word "port" should be in here; it is omitted through a clerical error. Then it goes on to say that "owners have same privilege as regards captain and officers and engineers during continuance of charter". These words were written in, in conversation with Mr. Craggs, so that he would have the power to remove them at any time, and agreed to both verbally and —

×-*Q.* 103. Don't you see, Captain Bennett, that the language does not say that? Don't you see that it gives no other power than to make a complaint? *A.* Not at all.

×-*Q.* 104. And the charterers are the ones — *A.* Not at all. Because it is an understood thing.

×-*Q.* 105. Never mind about "an understood thing". Isn't that what it says? *A.* That is what it says, and it was clearly explained that by that they have to change them if the owner wishes.

×-*Q.* 106. They have to change if the complaint is well founded. But who is it that does the changing according to the charter party? *A.* In many cases in this same steamer the engineer was appointed by the owners.

×-*Q.* 107. For the first six months? *A.* And for the balance they sent another one out.

×-*Q.* 108. Don't you see that he had the right to appoint for only six months? *A.* They had the right to appoint for six months, and as nearly as I recollect it, the man stopped in for nearly two years.

×-*Q.* 109. The point is, don't you see that you are testifying to something different from what the language of the clause is — namely, that the owners shall have the right to make complaint, and that it is the charterers' business? *A.* The owners have the right to make a complaint.

Mr. RUSSELL. The owner shall, on receiving particulars, investigate the same, and if called upon shall make a change.

Mr. KIRLIN. No. The charterers.

WITNESS. The owners have the same privilege.

×-*Q.* 110. Was it not the intention that that written clause should give to the owners the same privilege which in the printed clause was given to the charterers? *A.* Yes; the privilege of having the captain or officers removed if they don't attend to their duties, or get drunk, or do not comply with the requirements of the British Board of Trade. — Do you wish me to answer any of these other vessels?

Mr. RUSSELL. Do you want some more vessels?

Mr. KIRLIN. He does not seem to be able to give any details about them. Vessels are getting stranded and aground and all that sort of thing all the while.

×-*Q.* 111. Have you ever seen, in your experience, a charter party in which these words occurred: "Charterers to have the benefit of the insurance"? *A.* I never have. As a rule, the owners are given no benefit —

×-*Q.* 112. Have you ever seen a charter in which there were any words similar to those? *A.* Not to my knowledge, in which the charterer has got any benefit at all from the insurance.

×-*Q.* 113. Is it, then, your understanding that it is not the intention of this clause to give the charterers the benefit of the insurance? *A.* My understanding of this form of time charter, or any other form for that matter, is that the charterer is never approached on the question of insuring the vessel. He wouldn't touch it. The owner clearly understands that he is to pay for insurance on the vessel; and the charterer, as a rule, never bothers with it —

×-*Q.* 114. The charter says that — *A.* (*continuing*)—and doesn't care whether the vessel is insured or not. It is not his concern.

×-*Q.* 115. It is not your intention to testify that that clause means anything else than what it says? *A.* It is my intention to testify that that clause was put in the charter by me to clearly show that the owners paid for all insurance on the vessel against stranding, collision, and everything else, as is customary in all time charters. And I have never heard the matter questioned before, and I have fixed a thousand steamers on time charter.

×-*Q.* 116. Net form? *A.* Net form and admiralty. There are not today ten vessels on this form of charter on this side of the water.

×-*Q.* 117. The difference between what you call the net form and the admiralty form lies in this, does it not, — the chief difference, — that in the net form the charterers appoint the officers and crew, and in the admiralty form owners do? *A.* No. The chief difference —

×-*Q.* 118. Isn't that *a* difference? *A.* No. In some net forms of charter we take them with the owner's captain and the owner's officers and the owner's engineers. In others, sometimes, we take the officers, and sometimes we take the engineers. The main difference is that in the net form of charter the charterer pays for the wages of the crew, for the provisioning of the crew, and certain stores that he does not pay for in the admiralty form.

×-*Q.* 119. That comes right back to what I asked you: that it is a difference between the net form— *A.* (*interrupting*). What?

×-*Q.* 120 (*continuing*). That the charterers pay for all the wages? *A.* They pay not alone for the wages, but for the provisions and for certain stores. They may make a net form of charter in which the owners pay for provisions, but not the wages and the other. It is according to the question at the time as to how that shall be.

×-*Q.* 121. It is according to the question as to whether it is net or not, isn't it? *A.* I should say it would be a net form of charter party if it was made on this form and the owners paid for provisions and crew. It is only a question of trade; that is all.

×-*Q.* 122. [*Paper shown witness.*] Look at this document I show you and see what kind of form that is. *A.* It is the form of a firm that has failed and has gone out of existence.

×-*Q.* 122*a*. Net or— *A.* (*interrupting*). It is a fruit form of charter, only in use in America.

×-*Q.* 123. Net or admiralty, as you make the distinction? *A.* There is nothing of the net form about it, and it cannot be called an admiralty form. It is simply a form to meet the requirements of the fruit trade in the United States, and is now generally in use with certain alterations.

×-*Q.* 124. [*Another paper shown witness.*] Look at this one which I show you, and say whether that is what you call an admiralty form? *A.* It is the form of a firm of brokers, altered from the admiralty form to meet their views or trade.

×-*Q.* 125. Is it the admiralty form as regards wages and provisions and appointment of officers? *A.* Pretty much so.

×-*Q.* 126. Will that be a fair form to take as showing the difference, in your judgment, on the subject of wages and provisions between the net form and the admiralty form? *A.* No. Because this form of charter belongs to one of the largest firms in the steamship business that do very little chartering on this form.

×-*Q.* 127. I didn't ask you anything about that. I asked you about wages and provisions. That is what you refer to by the words "admiralty form"? *A.* It is not exactly like the admiralty form.

×-*Q.* 128. Will you be good enough to produce and send to us an admiralty form, as you call it, so we can know what you are

talking about? *A.* I don't believe there is today any broker that has ever used an admiralty form on this side of the water; only used on the other side. They have adapted an old admiralty form to meet the requirements of their charters.

×-*Q.* 129. Have you a form that you call an admiralty form? *A.* Brokers call —

×-*Q.* 130. No. *A.* One minute.

×-*Q.* 131. Do you have? *A.* No; nor any one else.

×-*Q.* 132. Then say so. *A.* We call it an admiralty form, but it is not an admiralty form.

×-*Q.* 133. You are using the words "admiralty form". I assume you mean something by it. I am trying to find out what you mean by it. *A.* An admiralty form, as generally known here, is a form got up by various steamship agents on which they charter vessels on time charter, and they all vary more or less.

×-*Q.* 134. Tell me what the provision in what you call the "admiralty form" is regarding wages and provisions — the general provision? *A.* The clause in the ordinary form of time charter, not the net form, is —

×-*Q.* 135. The admiralty form I am asking you about. *A.* The government, or admiralty, or usual form of time charter generally stipulates that the owners shall provide and pay for all provisions, wages, and consular, shipping and discharging fees of the captain, officers, engineers, firemen and crew; and shall pay for the insurance of the vessel, and also for all the cabin, deck, engine room and other necessary stores; and maintain her in a thoroughly efficient state in hull and machinery for and during the service; and that the charterers shall provide and pay for all the coals, port charges, pilotage, agencies, commissions, consular charges except those appertaining to the captain, officers, or crews, and all other charges whatsoever excepting those before stated (*Witness looking at a paper*).

×-*Q.* 136. State the provisions regarding the same subjects in the net form of charter. *A.* The net form of charter states that the charterers shall provide and pay for all oils and stores for the vessel, gear, tackle and appliances for loading and discharging the cargo, and for all the provisions and wages of the captain, officers, engineers,

firemen and crew; that the owners shall pay for the insurance and other things not specified. In other words, you can't make charterers pay for what is not specified.

×-*Q.* 137. You did not read that out of the charter party — that last part of it — did you? *A.* It is clearly what the charterers pay for; what is not specified for them to pay they never have paid, nor are they expected to pay it.

×-*Q.* 138. Isn't it always specified what the owners shall pay for? *A.* The general term of the charter party specifies that they shall pay for everything except that.

×-*Q.* 139 Where is that general term? *A.* Read it right through.

×-*Q.* 140. You point it out to me. It is your form. *A.* The charter starts by stating that the steamer shall be provided with winches, propeller, crank shaft, tail shaft, etc.

×-*Q.* 141. There is no use reading it aloud. We know what is provided by one, and what by the other. You say that there is a provision that they shall pay for everything that is not provided. *A.* I don't say anything of the kind. I say it is specified exactly what the charterers shall pay for, and they cannot be made to pay for anything else, and it is understood by the charter that the owners pay for what is not specified that the charterers shall pay for.

Mr. Russell. That is your necessary implication?

Witness. Yes.

×-*Q.* 142. That is your implication. But there is no provision in the charter to that effect, is there? *A.* I think you will find it in there — in clause 2, in which it states that the owners shall maintain the vessel in a thoroughly efficient state in hull and machinery for the service, etc.

×-*Q.* 143. Certainly that is a plain provision; but you say that things that are not provided for are to be paid for by the owners, and I ask you to point out anything in the charter which says that. *A.* Because in clause 2 it states, as I have before said, that the owners shall maintain the vessel. Naturally, they would have to pay for everything that is necessary to maintain the vessel; and the charter specifies what is required of the charterers to pay.

×-*Q.* 144. That is the clause to which you refer, then, as the foundation for the inference you draw? *A.* Yes, — and by clause 8.

×-*Q.* 145. [*Paper shown witness.*] Look at this document which I show you, and say whether you recognize that as a form of a former firm of W. W. Hurlbut & Company? *A.* That is one of their forms of time charter; but after I left the firm they got up some forms, and I would have to look through it to see.

×-*Q.* 146. Do you know whether this was before or after you left the firm? *A.* I am pretty sure it is after it, by the color. Without I examined it all through, word by word, I wouldn't trust myself to swear on it. [*Said paper is marked* "Petitioner's Exhibit 3 for identification, March 18, 1897".]

×-*Q.* 147. You know the firm of Miller, Bull & Knowlton here, ship brokers, in New York? *A.* Yes.

×-*Q.* 148. They have been ship brokers for a great many years in New York, have they not? *A.* Yes.

×-*Q.* 149. [*Paper shown witness.*] Do you recognize that as their form of time charter? *A.* I recognize this as a form which the firm of Miller, Bull & Knowlton tried to charter steamers on, on which I have chartered them several, but on which owners object to it, as it differs from the ordinary admiralty form in various clauses, — 27, 25, 24, 17. In fact, in other words, the charter is altered to suit the people who drew it up.

Mr. Russell. The form is altered, you mean.

Witness. Yes. The form is altered to suit the people who drew it up in the interest of their own business, and is not in general use. [*Said paper is marked* "Petitioner's Exhibit 4 for identification March 18, 1897".]

×-*Q.* 150. Just read us what it says about insurance. *A.* Clause 1 is very near what is usual in the government form of charter, but not in the net.

×-*Q.* 151. Doesn't it say the owners "shall pay for the insurance of the vessel"? *A.* It does. It does in most all forms of time charter, — that the owner shall pay for the insurance of, or on, the vessel.

×-*Q.* 152. It says it in that one? *A.* Yes.

×-*Q.* 153. You know the firm of Bowring & Archibald, steamship agents, New York? *A.* Yes.

×-*Q.* 154. [*Paper shown witness.*] Do you recognize that

as their form? *A.* Bowring & Archibald have several various forms.

×-*Q.* 155. That is one of them? *A.* This is their government form of time charter — not net form. And that, as the other charters you show me, is to meet the requirements of their trade, and so altered from the old admiralty form or government form.

×-*Q.* 156. The provision there is that the owners "shall pay for the insurance of the vessel", is it not? *A.* It so states there. [*Said paper is marked* "Petitioner's Exhibit 5 for identification, March 18, 1897".]

×-*Q.* 157. [*Paper shown witness.*] Do you recognize this as another one of their forms? *A.* This is another of their forms. [*Said paper is marked* "Petitioner's Exhibit 6 for identification, March 18, 1897".]

×-*Q.* 158. The provision there for insurance is identical, is it not? *A.* It is stated in all time charter forms much the same as this: that the owner shall pay for the insurance of the vessel. The clerical wording in some is that they shall pay the insurance on the vessel, or for the vessel, the object being to show that the owners pay insurance.

[*Counsel for petitioner moves to strike out the latter part of the answer as not responsive.*]

×-*Q.* 159. The question I asked you was whether the provision in this form is not also that the owners "shall pay for the insurance of the vessel." *A.* Am I obliged to answer yes or no to that question?

Mr. Russell. You can answer yes or no, and then you can explain your answer.

A. As long as I am allowed to explain my answer, — yes.

Mr. Russell. Now you can go on and explain your answer.

Witness. The object being in all these forms of time charter to show that the owner shall pay for the insurance on or for the vessel; there is a difference in the way of expressing it in various charters.

[*Counsel for petitioner moves to strike out all of the answer as irresponsive.*]

×-*Q.* 160. Do you know the firm of Barber & Company, steamship agents here? *A.* Yes.

×-*Q.* 161. [*Paper shown witness.*] Do you recognize that as their government form? *A.* That is one of their forms. I do not think that is the present one in use. It has become obsolete.

×-*Q.* 162. You see the figures "189" in the body of it? *A.* Yes; but still, despite that, I have closed ten boats with them in time charter within the last six months on another form.

×-*Q.* 163. That has been a form somewhere in the decade 1890? *A.* That has been a form they adapted; but, if you will look at it, it is for special business. It is for the west coast of South America, to meet the requirements of that trade. [*Said paper is marked* "Petitioner's Exhibit 7 for identification, March 18, 1897."]

×-*Q.* 164. The provision there is, is it not, that the "owners * * * shall pay for the insurance *of* the vessel"? *A.* I answer that the same way. Yes; the object in all these charters being to show that the owners shall pay for the insurance of the vessel. The way of expressing it, "on" or "for" the vessel — the way of expressing whether "on" or "for" the vessel — being a matter of opinion — how the firm have their charters printed; the main object being to show that the owners pay for all insurance on the vessel.

[*Counsel for petitioner moves to strike out all of the answer after "yes" as irresponsive.*]

×-*Q.* 165. [*Paper shown witness.*] Look at this form which I show you, and say whether you recognize that as a form of charter by Simpson, Spence & Young, steamship agents, of New York? *A.* I have seen hundreds of Simpson, Spence & Young's charters on grain, and I have never seen one on time charter; so I cannot say.

×-*Q.* 166. You have never seen one of their time charter forms before? *A.* No.

×-*Q.* 167. This purports to be one of theirs? *A.* I don't doubt but what it is. They are a very large firm, but do very little in time charters. They do the bulk of the Atlantic business. In other words, they have so many steamers they do not bother much with time charters.

×-*Q.* 168. The provision in this form is that "the owners * * * shall pay for the insurance of the vessel", is it not? *A.* Yes; it

is so stated by them in the charter party — that the owners shall pay for the insurance of the vessel. [*Said paper is marked* "Petitioner's Exhibit 8 for identification, March 18, 1897".]

×-*Q.* 169. You know the firm of Funch, Edye & Company, steamship agents, in New York? *A.* Yes.

×-*Q.* 170. They are large agents here, are they not? *A.* A very large firm.

×-*Q.* 171. They do a good deal of time charter business? *A.* They are my principal competitors. I think they have got twenty steamers on time charter, and we have got about ninety.

×-*Q.* 172. The provision in this form with respect to insurance is that the owners "shall pay for the insurance of the vessel", is it not? *A.* Yes. Funch, Edye & Company's object in putting it in being to show that the owners would pay for the insurance of the vessel, either in stranding, collision, or anything else that is customary.

[*Counsel for petitioner moves to strike out all of the answer after* "yes" *as irresponsive. Said paper is marked* "Petitioner's Exhibit 9 for identification, March 18, 1897".]

×-*Q.* 173. Do you know the firm of J. M. Ceballos & Company, New York, steamship agents and merchants? *A.* I know J. M. Ceballos & Company.

×-*Q.* 174. [*Paper shown witness.*] Do you recognize that as their form of time charter? *A.* I couldn't say. I don't believe that it is the one at present in use.

×-*Q.* 175. This seems to be one of their forms, does it not? *A.* I think they have another one in use today.

×-*Q.* 176. Do you know whether you ever closed one on one of these for them? *A.* I closed so many boats it is impossible to tell. I closed several boats for J. M. Ceballos & Company.

×-*Q.* 177. The provision in this form, whether they use it at present or not, is that the owners "shall pay for the insurance of the vessel", is it not? *A.* Yes. It is adapted from our form of charter, or Funch, Edye & Company's. It consequently shows — the object being for the owners to pay for all insurance on the vessel against stranding, collision, etc., unless they choose to take the risk themselves.

[*Counsel for petitioner moves to strike out the last sentence as irre-*

sponsive. Said paper is marked "Petitioner's Exhibit 10 for identification, March 18, 1897.]

×-*Q.* 178. [*Paper shown witness.*] You recognize this as another one of Simpson, Spence & Young's forms of time charter? *A.* Simpson, Spence & Young do a large time charter business in Europe. There are very few boats that I know of closed on this form on this side of the water. If you will look through the charter you will find it is the United Kingdom form.

×-*Q.* 179. They have an office at Newcastle-upon-Tyne, have they? *A.* Simpson, Spence & Young, and Funch, Edye & Company, are the largest firms in the ship broking business.

×-*Q.* 180. Simpson, Spence and Young, have an office at Newcastle-upon-Tyne, have they not? *A.* I couldn't swear to it; I believe, yes; I know they have one in London.

×-*Q.* 181. And the provision in this form is that the owners "shall pay for the insurance *on* the vessel", is it not? *A.* Yes. They, like other brokers, have adapted that from the other forms of charter — the object being to show that the owners shall pay for all insurance on the vessel.

[*Counsel for petitioner moves to strike out the latter part of the answer as irresponsive. Said paper is marked* "Petitioner's Exhibit 11, March 18, 1897".]

×-*Q.* 182. [*Paper shown witness.*] You recognize this as Funch, Edye & Company's fruit time charter? *A.* Yes. This is Funch, Edye & Company's fruit form of time charter. And this, like all the other charters you have shown me, is not a net form of charter. Besides, this is a fruit form — purely local for our trade.

×-*Q.* 183. The provision in this with reference to insurance is that the owners "shall pay for the insurance *of* the vessel", is it not? *A.* Yes. In this, as in most all time charters, it clearly states that the owners shall pay for the insurance of the vessel. This being as short a way of condensing that the owners shall pay for everything as any broker or steamship agent that I know of can express.

[*Counsel for petitioner moves to strike out all of the answer after "Yes" as irresponsive. Said paper is marked* "Petitioner's Exhibit 12 for identification, March 18, 1897".]

×-*Q.* 184. Do you know John R. Livermore, ship broker, in

New York? *A.* I never knew that he chartered any vessels on time charter.

×-*Q.* 185. [*Paper shown witness.*] This purports to be a form printed by him, does it not? *A.* It is probably adapted from some other broker's form.

×-*Q.* 186. The provision in this is that the owner "shall pay for the insurance *of* the vessel", is it not? *A.* Yes. This charter is doubtless a copy of some other broker's form, as near as I can see; there may be some alteration in the clauses to suit Mr. Livermore's trade. It being clearly the object to show that the owners should pay for all insurance on the vessel.

[*Counsel for petitioner moves to strike out the latter part of the answer as irresponsive. Said paper is marked* "Petitioner's Exhibit 13 for identification, March 18, 1897".]

×-*Q.* 189. [*Paper shown witness.*] Do you recognize this as a further form of Simpson, Spence & Young's, — "G. F. Time Charter, U. S. A."? *A.* This is a cattle form of charter, and not in use in anything else. It has no bearing on the subject except to show that even on this form of time charter the owners "shall pay for the insurance on the vessel". [*Said paper is marked* "Petitioner's Exhibit 14 for identification, March 18, 1897".]

×-*Q.* 188. Are there any other brokers in New York that you recall that print forms of time charters? *A.* Are there any other? There are F. J. Lord, Samuel Holmes, Miller & Houghton, W. W. Battie.

×-*Q.* 189. I mean those who print a form? *A.* They print a form. There are several besides them, and various others that print time charter forms but effect very little business on them; and most all of these are adapted from either Funch, Edye & Company, Simpson, Spence & Young, or our own forms. In other words, they adapt West Indian, Central American and fruit forms from our old form of charter. They adapt cattle forms or some of the European forms from Simpson, Spence & Young; the ore form of charter, etc., from Funch, Edye & Company.

×-*Q.* 190. These forms that I have brought to your attention, including your own, of course, which is in evidence, are the principal forms, are they not? *A.* The chartering on this side of the water is

done, on time, almost entirely by Funch, Edye & Company and ourselves; probably not ten per cent. of the business is done by others. We have at the present time about ninety under time charter; Funch, Edye & Company about twenty; I think Bowring & Archibald have twenty, including what they have in the St. Lawrence, West Indies and European trades. It is a specialty of our firm; whereas they have specialties in grain or other forms of charter with which we do not bother.

×-*Q.* 191. You do not claim to have been the author of clause 22 in your form of time charter which is used in this case, do you? *A.* I adapted clause 22.

×-*Q.* 192. Wasn't the firm of W. W. Hurlbut Company using that form? *A.* I adapted that form to meet the requirements of the trade while a partner in the firm of W. W. Hurlbut & Company some years ago.

×-*Q.* 193. Wasn't the firm of W. W. Hurlbut & Company a firm before you went to it? *A.* It was W. W. Hurlbut before I went to it.

×-*Q.* 194. Hadn't W. W. Hurlbut been using that exact clause before you went to his firm? *A.* I don't think they had. They had no occasion to use it. They had various forms of charter; and all charter parties are altered from year to year as the trade varies.

×-*Q.* 195. Hasn't it struck you that there was no alteration in these insurance clauses in any of these charters that have been brought to your attention today? *A.* I see very little necessity for altering, as it is contained as briefly as possible that the owners pay on, or for, the insurance of the vessel, and have been doing so; and I have never known a case where they asked others to contribute.

×-*Q.* 196. Haven't you noticed that in none of the forms which are brought to your attention was there any provision that the owners should pay for the insurance "*for*" the vessel, but in each case it has been "*of*" the vessel or "*on*" the vessel? *A.* I couldn't positively say. I do notice that you have not shown me one single form of net charter; all admiralty forms; and that this charter of the Barnstable is on the net form; and you have not showed me one. Otherwise you might find the change.

×-*Q.* 197. Don't you notice that the clause in the admiralty

forms is identical with the clause as you have it worded in your net form? *A.* Pretty much so.

×-*Q.* 198. Why did you make any suggestion that there would be any difference if I showed you net forms — difference with regard to this clause? *A.* There would be a difference regarding the other clause. I understand you are now speaking of clauses 11 and 22, both.

×-*Q.* 199. I have not asked you any questions about clause 22 in the last half hour. I have been asking you entirely about the insurance clause. Do you mean to suggest that there is any difference between the form of insurance clause in the net form and in all these forms that I have shown to you today? *A.* There is very little difference in the insurance clause, but there is a world of difference in the other clauses.

×-*Q.* 200. You carry that clause in your charters today, clause 22, in precisely the same form, don't you? *A.* Pretty much the same form — to show that the owners pay for all the insurance of the vessel?

[*Counsel for petitioner moves to strike out the latter part of the answer as irresponsive.*]

×-*Q.* 201. Captain Bennett, I will be obliged to you if you will confine your answers to my questions. *A.* I am trying to.

×-*Q.* 202. You are not trying to. Every time I ask you a question you put in a lot of matter that is not called for. *A.* All right.

×-*Q.* 203. Isn't it a fact that you carry this clause in your net charters today, and in your admiralty charters, in precisely the same form? *A.* Pretty much the same form, with the alteration of the word "on" or "for" in some forms.

×-*Q.* 204. Will you be good enough to send to Mr. Russell any form you have got, or ever have had, in which the word "for" occurred in that clause? *A.* You have got it here: "The owners shall pay *for* the insurance of the vessel" (*witness indicating a paper*).

×-*Q.* 205. "*On*" the vessel, isn't it? *A.* No. "For;" "The owners shall pay *for* the insurance on the vessel." That is the word "for" that I mean.

×-*Q.* 206. You do not mean to say that you have got any form in which there is any provision that the owners shall pay for the insurance *for* the vessel, do you? *A.* I think it would be bad grammar.

×-*Q.* 207. You have used it several times yourself? *A.* It has been in answer to your questions, because I misunderstood you.

×-*Q.* 208. You do not mean to say, then, that it is ever usual to phrase the clause "shall pay for the insurance *for* the "vessel"? *A.* I do not see any necessity of putting it in that way? It doesn't sound right.

×-*Q.* 209. Why won't you answer the questions I put to you? These are straightforward questions. Give me straightforward answers. *A.* I am giving you straightforward answers. Why should I put it "pay for the insurance *for* the vessel"?

×-*Q.* 210. Don't argue with me. Tell me whether it is or not. *A.* I have not, as near as I can recollect, seen it, "that the owners shall pay for the insurance *for* the vessel". I see no necessity for putting it in "*for* the vessel".

×-*Q.* 211. Have you ever seen it put in? *A.* I don't know as I have.

×-*Q.* 212. You have never put it in yourself? *A.* I may have.

×-*Q.* 213. Will you send us any clause in which you have put it in that way? *A.* I will do it. That clause is generally printed and adapted from other charters, as I have before told you.

×-*Q.* 214. Don't you know that that clause, in those identical words, has been in charter parties ever since you were born? *A.* Yes. I suppose they were in charter parties before I was born.

×-*Q.* 215. You don't claim ever to have made any substantial alteration in that clause? *A.* No.

×-*Q.* 216. In adapting it into your charter? *A.* No. The clause is so clear that I see no necessity. I am continually making up new charters, and I adapt certain clauses from other charters.

×-*Q.* 217. Isn't it a fact that there are very few vessels at present chartered on the net form? *A.* The majority of vessels are chartered on the government form of charter.

×-*Q.* 218. Isn't it a fact that there are not ten in this country today chartered on that form? *A.* Oh, I think there must be over

ten. We have seven to the Boston Fruit Company. We have had two to George Crystal.

×-*Q.* 219. What are their names? *A.* We have had two to George Crystal, the Carib Prince and Creole Prince. I think there are about twenty, as near as I recollect. I think I counted up about twenty.

×-*Q.* 220. That means that twenty in all have been made in your experience? *A.* No. There has been —

×-*Q.* 221. You know that the Carib Prince and the Creole Prince have not been running for George Crystal for — *A.* You have got six or seven boats down South for these men that I have not made.

×-*Q.* 222. That you have not made? *A.* That I have not made; but they do it themselves down there. But the form has been used at times to a great extent, more so than at present, especially when our wages here are lower than they are in England.

×-*Q.* 223. You have yourself, apart from the vessels that you have chartered to the Boston Fruit Company, chartered very few vessels on that form in your whole experience, have you? *A.* Very few, or anybody else on this side of the water; but our people on the other side have chartered a great many. There is nobody charters on the net form. The owners won't trust their vessels on that form, unless it is a substantial steamship line, or a heavy corporation with substantial resources. That is about the size of it. I wouldn't charter my boat on net form to a stranger.

×-*Q.* 224. Why not? *A.* For the reason he might feed my crew as he liked.

×-*Q.* 225. Why do you call them your crew? *A.* Well, for the reason that he has got the feeding of the crew and the keeping of the ship in order with that crew.

×-*Q.* 226. Well, it wouldn't make you as uncomfortable as it would the men, if he didn't feed them well, would it? *A.* Not at all.

×-*Q.* 227. What are your objections to it in that form? *A.* Well, I will tell you. My objections as an owner are that in the charter on the net form the boat is taken away from you; I never see it. If I am living on the other side, the men may be lazy, and the charterer, unless a good business man, may not make them work. They won't keep the ship in proper order.

×-*Q.* 228. Can't you require that? *A.* Yes; but I have not time, probably, or money to pay my way over here, and to watch over them every day the same as I would if they were running out of my own port.

×-*Q.* 229. There is a provision in the net form that the owners shall maintain the vessel in a thoroughly efficient state in hull and machinery, isn't there? *A.* Yes.

×-*Q.* 230. What care is that that you referred to as belonging to the charterer? *A.* When the owner is not here to do it, and don't see the men. That is merely my opinion; a good many may prefer to charter on that form.

×-*Q.* 231. Do you know an English firm named Charles Gee & Company, London? *A.* I believe there is such a firm.

×-*Q.* 232. Would you recognize their form of charter if you saw it? *A.* I would not. There are a hundred ship-broker firms on the other side, that I know by hearsay, that have various forms of charter. I have never seen a time charter on their form.

×-*Q.* 233. Do you know the firm of Frank C. Strick & Company Limited? *A.* Never heard of them.

×-*Q.* 234. London, Swansey and Cardiff? *A.* I never heard of them.

×-*Q.* 235. [*Paper shown witness.*] Look at this form which I show you, which purports to be their form, in which clause 1 reads as follows: "The owners shall provide and pay for all oils, paints and deck, cabin and E. R. stores, including water, and all the provisions and wages, and shipping, discharging and other fees of the captain and officers, engineers, firemen and crew; shall pay for the insurance on the vessel against all risks, including protection and indemnity, and freight and demurrage club protection; give charterers full benefit of same, as if they were for the time being owners of the ship; also for all engine-room stores, and ordinary tackle for loading and discharging cargo as required and approved by charterers; and maintain her in a thoroughly efficient state in hull and machinery for the service." Tell me whether you have ever seen that form? *A.* I have never seen it, never heard of the people, and never knew them, and don't believe there ever was a ship chartered on any such form for the American trade. In fact, I am positive of it.

[*Marked* "Petitioner's Exhibit 15 for identification, March 18, 1897".]

×-*Q.* 236. Didn't you, while you were a member of the firm of W. W. Hurlbut & Company, have two boats called the Pirate and the Kenilworth under your supervision? *A.* No.

×-*Q.* 237. Had you nothing at all to do with them? *A.* Not the slightest, or wouldn't have with any such clause as that.

×-*Q.* 238. Did you ever see their charter? *A.* No. Don't want to see it if it is anything like that. I would rather let some other man make the commission.

×-*Q.* 239. Did you have a vessel called the Scythian under your management, or for which you acted as agent, while you were connected with the firm of W. W. Hurlbut & Company? *A.* I think we sold the Scythian to Munson while I was in the firm, but W. W. Hurlbut & Company were agents after I left the firm; I never had anything to do with it.

×-*Q.* 240. Wasn't she under charter while you were with the firm? *A.* Not to my knowledge. If she was I had no hand in the negotiations.

×-*Q.* 241. Did you ever see her charter? *A.* I can't think. I know that after I left the firm she was chartered and also sold by W. W. Hurlbut & Company, and either through the charter or sale, or something, the firm has lost a good many thousand dollars, and I believe at present they are suing her, but I don't know positively. I know that I never had anything to do with the Scythian that I can remember, except I may have had a hand in her sale to Munson years and years ago.

×-*Q.* 242. You cannot say, then, whether either the Pirate or the Kenilworth was chartered on a form which contains a clause similar to the clause I read to you from Exhibit 15 for identification? *A.* I cannot. Probably the business was done by Mr. Hall. But it is a peculiar clause that I have never seen before, and one that I wouldn't care to put in any charter on this side of the water. I prefer to let some other broker do that, and lose my commission.

×-*Q.* 243. What is your objection to it? *A.* I don't like it. I don't take any risk. I don't take any risk for clients, whether owners or charterers. It might be good enough for all I know.

×-*Q.* 244. You recognize that as a different clause from the clause in the American charters? *A.* Yes; it never, to my knowledge, has been used on this side of the water. It may have been used in the vessels you stated; but I will warrant, if used, it was put in for some purpose by a man that was educated on the other side, and that the charters of the steamers never ran through without trouble.

×-*Q.* 245. You have no objection to it except the general one that it is novel and you don't like it, I understand you? *A.* I have no objection, except it has never been used on this side, it is novel, and may cause too much trouble, and I see no necessity for it.

×-*Q.* 246. What had your business been before you went with Hurlbut? *A.* I was shipmaster for years; been to sea prior to that a good many years.

×-*Q.* 247. And was your first experience in Hurlbut's office as a ship broker? *A.* Oh, as master of vessels, and in connection with the sea, I had been dabbling in charters and shipping cargoes for some time previous to that. I have been interested in ships in one way or another all my life.

×-*Q.* 248. Have you any interest in this controversy? *A.* Not in the slightest.

×-*Q.* 249. Are any of the parties interested with you in any way? *A.* None more so than parties in both cases are clients of mine, and friends. I know that my intention was clearly to specify in making the trade between them that the owners should pay for all insurance on the vessel against stranding, collision, or anything else, and I so stated to Mr. Craggs, the then owner.

×-*Q.* 250. Are any of the officers or directors of the Boston Fruit Company interested in your firm? *A.* Our firm is a special partnership firm. We have various owners, charterers, and others as special partners.

×-*Q.* 251. Mr. Preston, the president of the Boston Fruit Company? *A.* Mr. Preston has an interest of one thousand dollars. He does not interfere —

×-*Q.* 252. In your firm? *A.* In our firm, in the slightest way.

×-*Q.* 253. He is a special partner in your firm? *A.* He is special partner in our firm to the extent of $1000. And the owner

of the steamer has far more interest with us, as we are agents for the Brookline, Barnstable, Mexicano; have also closed the Buckingham and other vessels through him; at the present time do all our Newcastle business through him.

×-*Q.* 254. In making these charters, you first, as I understood your testimony, get the instructions of the charterers as to what they will give, what they want, and then approach the owners with offers? *A.* I am a broker. I make my living by chartering ships. If I find a man wants a ship I try to offer him one. If I find an owner has a ship to charter I try to get him a customer. That is my business.

×-*Q.* 255. Who initiated the negotiations between you and Craggs? Who said the first word? *A.* Mr. Craggs was out here years ago, and went to Jamaica.

×-*Q.* 256. I suppose there was not anything said about the Barnstable then? *A.* He then offered to build a boat for the company, but wanted too much money. He sent a model over. She was too slow and too costly. I kept after Mr. Craggs not only on these boats, but on others. I closed a big oil tank steamer with him. His ship builders have negotiated building several vessels, and I naturally go to him if I know he has a vessel open.

×-*Q.* 257. [*Paper shown witness.*] Is that a certified copy of the Barnstable charter? *A.* Yes.

×-*Q.* 258. Is that your signature? *A.* That is Mr. Welch's. [*Said paper is marked* "Petitioner's Exhibit 16 for identification, March 18, 1897".]

EXHIBIT A, MARCH 18, 1897, E. H. C., STEN.

[MEMORANDUM. The printing of this Exhibit A is omitted as it is the same as the Time Charter, Exhibit C, printed on pages 14 to 18. JOHN G. STETSON, *Clerk.*]

DEPOSITIONS OF WITNESSES TAKEN ON BEHALF OF THE PETITIONER.

NEW YORK, May 8, 1897.

Present: Messrs. CONVERS & KIRLIN (*by* Mr. KIRLIN) *for the Petitioner;*

Messrs. RUSSELL & RUSSELL (*by* Mr. C. T. RUSSELL) *for the* BOSTON FRUIT COMPANY.

Same stipulation entered into as made on page 38 of deposition of William H. Bennett, March 18, 1897.

DEPOSITION OF JOHN H. GOURLIE.

Direct Examination by Mr. KIRLIN.

JOHN H. GOURLIE, called on behalf of petitioner, being duly sworn, testifies as follows:

Q. 1. Mr. Gourlie, you are a member of the firm of Johnson & Higgins, New York? *A.* Yes.

Q. 2. And what is their general business? *A.* Average adjusting and insurance.

Q. 3. Marine insurance — insurance on vessels? *A.* Insurance on property generally — vessels, cargoes, etc.

Q. 4. Have you had a good deal of experience on vessels on these and English policies? *A.* Well, I have been in this business about thirty years.

Q. 5. Are you familiar with the ordinary kinds of insurance here and abroad? *A.* Yes.

Q. 6. What is your connection with the insurance of vessels — I mean the connection of your firm? *A.* We are brokers.

Q. 7. Brokers? *A.* Intermediaries between the owners of vessels and the underwriters.

Q. 8. You receive the applications and procure and deliver the policies? *A.* Yes.

Q. 9. Are you able, from your experience, to say whether the

practice of insurance on vessels, in some amount, is of a very general character? *A.* I don't quite catch that.

Q. 10. I will put it in another way. Are you able, from your experience, to say whether or not the practice of insuring hulls, to some extent, is general? *A.* It is the general practice to insure hulls, yes.

Q. 11 (*by* Mr. RUSSELL). I suppose that depends upon the solvency and the wishes of the insured? *A.* Yes; and also upon the wishes of the underwriters — because it takes two to make a bargain.

Q. 12 (*by* Mr. KIRLIN). So that in every case you would naturally expect to find some insurance? *A.* No; I wouldn't want to say that.

Q. 13. Well, generally. *A.* Insurance is a general custom; but in every case it would not follow that you would be justified in expecting insurance.

Q. 14. What is the chief case where you would not expect to find insurance on a hull? *A.* Well, by that I meant that while it is a general practice to insure, everybody does not insure. That is all I meant by that.

Q. 15. Will you produce a copy of the Lloyd's policy on a vessel? *A.* That is a copy I gave you yesterday, which is a Lloyd's policy if you ignore the italics. I suppose, if I had hunted further, I could have found one without the italics (*witness indicating a paper*).

Q. 16. [*Another paper shown witness.*] I show you a sheet which is taken from the second edition of McArthur on Marine Insurance, and ask you whether that is a naked form of the Lloyd's policy? *A.* Yes; that is the customary form of Lloyd's policy commencing "Be it known".

Mr. KIRLIN. I will put those two in, but I will have to reserve leave to keep the original of one, the one on the Westernland, owing to the fact that it is a private document, but it will be produced for the inspection of the court.

Mr. RUSSELL. I am willing that you should substitute a copy.

[*Policy on Westernland marked* "Barnstable Exhibit 17, May 8, 1897".

Extract from McArthur on Marine Insurance marked "Barnstable Exhibit 18, May 8, 1897".]

Cross Examination by Mr. RUSSELL.

×-*Q.* 17. Mr. Gourlie, it is usual, is it not, for a vessel taking out insurance to take insurance against running down? *A.* I think that insurance commonly, when taken, is taken including running down.

×-*Q.* 18. And when a vessel is fully covered you would expect that she would be covered against the running down risk? *A.* Against a portion of the running down risk.

×-*Q.* 19. That is three quarters, I presume? *A.* Yes, that is it.

×-*Q.* 20. Isn't it, as matter of fact, now customary to insure the other remaining one quarter? *A.* No. It is done, but it is not a customary thing.

×-*Q.* 21. So that when you speak of a policy of insurance on a vessel you would understand that it covered at least three quarters of the running down? *A.* Well, no. Answering that question I don't think that I would. But if I were asked what I would expect to find in a full insurance on a vessel (which was the question, the way you put it before), I should answer that I would expect to find that it included the three quarters collision clause.

×-*Q.* 22. And the other one-quarter would remain on the vessel? *A.* Uncovered, as a rule.

×-*Q.* 23. Mr. Gourlie, don't you know, as matter of law, that where a vessel is insured against marine risk, that marine risk includes running down? *A.* I know as matter of law that it does not.

×-*Q.* 24. What law do you refer to? *A.* I refer to the English law; and I refer to the Supreme Court decision of the United States overturning the previous rule laid down in Peters against Warren, by Judge Story.

×-*Q.* 25. You do not recognize as law the decision of the Supreme Court of Massachusetts? *A.* No; unless we are limited to that forum.

×-*Q.* 26. Where a charter party provides that the owner shall pay for the insurance on the vessel, would not that, in your opinion, include all insurance? *A.* No.

×-*Q.* 27. You think there would be something left— *A.* (*interrupting*). Theoretically, all possible insurance —

×-*Q.* 28. [*Interrupting.*] I mean against the running down.

Mr. KIRLIN. I object to that as a matter for the court.

Mr. RUSSELL. I understand all this evidence is subject to objection.

A. I understand your question. Would I not argue that that clause obligated —

×-*Q.* 29. [*Interrupting.*] I am not asking you to argue; I am asking your opinion as an expert. *A.* I beg pardon. Would it not be my opinion —

×-*Q.* 30. [*Question repeated.*] Where the charter party provides that the owner shall pay for the insurance on the vessel, would not that, in your opinion, include all insurance? *A.* No.

×-*Q.* 31. What would not be included? *A.* I do not think that the four-quarters collision would be included in it.

×-*Q.* 32. That is, under that clause in the charter party, in your opinion, the ship owner would insure against the loss of the vessel, and the charterer would insure against her running down? *A.* No; I didn't mean that either.

×-*Q.* 33. Will you please explain, then? *A.* Under that clause I should not expect that the owner of the vessel would insure against everything. For instance, I should not expect to find that he would insure against more than three-quarters collision?

×-*Q.* 34. You would expect him to insure to the extent of three quarters? *A.* Yes; that is my feeling on the subject.

×-*Q.* 35. Mr. Gourlie, in your large and extended experience, have you ever known a case where a ship owner, agreeing to pay for insurance, has made a claim upon a charterer for a running down — for a collision loss? *A.* To me that is novel.

×-*Q.* 36. I am asking you. You answer my question that in your opinion, or in your experience, that is a perfectly novel idea? *A.* I don't know whether it is a novel idea. I have never known it to be done.

Re-Direct Examination by Mr. KIRLIN.

Q. 37. Does the matter of adjustment of liability as between charterer and owner ever come before you as a practical matter? *A.* Yes.

Q. 38. Any liabilities for running down through the neglect of the charterer's servants? *A.* I never have had that question come up before me.

Q. 39. That is the question we have here? *A.* I never have had this question come up before me.

Q. 40. What is the form of the so-called running down clause? Would you like to take it from this book? [*Book shown witness.*] *A.* Yes. I can pretty nearly remember it, but still — It in effect provides that if the vessel hereby insured shall come into collision with any other ship or vessel, and if the insured shall in consequence thereof be held liable to pay and shall pay, then we, the insurers, agree to pay three quarters of the sum so paid, not exceeding the sum insured. Then there is a provision in continuation as to the costs of litigation; and there is a provision as to the result of cross libels and cases of mutual fault; and then there is a provision that this policy does not include loss of life, or personal injuries or obligations to pay for the removal of wrecks, or statutory powers, and things of that sort.

×-*Q.* 41 (*by* Mr. RUSSELL). You are speaking now entirely of the English policy? *A.* I am speaking not only of the English policy, but of the common form of clause made use of in this country for insuring against collision or running down. Years ago there was a clause that the underwriter was liable for collision, according to the decisions of the State courts of Massachusetts, prior to 1853. That clause is obsolete.

Q. 42 (*by* Mr. KIRLIN). That does not include, then, the liability for death caused by running down nor personal injuries? *A.* No; it does not include death, nor personal injuries, nor the expense of removing a wreck.

Q. 43. Is that clause similar in substance in the American policies? *A.* Well, the custom now is to use in America practically the same clause that is used in England; for the reason that the field for insurance for American underwriters is so limited that a large part of the business on hulls, if done in America at all, is done largely with English agencies in America; so that that clause is in common use.

Q. 44. Now tell us whether the insurance with the running down

clause entails an extra premium over insurance on vessel a under the ordinary form. *A.* Certainly it does. The more you buy the more you have to pay for.

Q. 45. It entails an extra premium? *A.* Yes.

Q. 46. Is the practice of insuring with the running down clause attached as general in the United States as it is in England? *A.* No.

×-*Q.* 47 (*by* Mr. RUSSELL). Do I understand that it is more frequent in England than in this country to insure against running down? *A.* More general in England than here.

×-*Q.* 48. You mean by that, more general with an English vessel? *A.* Yes, I do exactly. I should be much more surprised to find an English vessel not insured with the running down clause than I would be to find an American vessel not insured with a running down clause.

Q. 49 (*by* Mr. KIRLIN). If an insurance with a running down clause is taken to Lloyd's, how is that connected with the Lloyd's policy, such a form on vessels as you have produced, Exhibit 17? *A.* They usually put a printed slip or rider, as it is called, upon the policy; and I would say that I have never seen the rider in the customary form as used in England that did not have the words in print, and the erasure of Lloyd's three quarters to cover four quarters; they erase with pen and ink the words "three quarters". They do not have any printed clause with those words omitted; showing that the usage is three quarters rather than the whole.

Q. 50. What is the object of that? *A.* The theory originally was that as the loss under that clause was only created through negligence, the underwriter wanted to make the owner particularly careful, and therefore he refused to extend to him entire protection, leaving him one quarter unprotected. But that purpose of the underwriter is frequently set at naught by a man going elsewhere and getting that one-quarter protection.

Q. 51. By "elsewhere" what do you mean? *A.* To another underwriter.

Q. 52. What is the practice about including the running down clause in American policies? Is it a rider, or on a separate form of policy, or in the ordinary policy? *A.* It is usually a rider. Some

underwriters, however, doing a large business, have enough forms to meet the exigencies of their business, and they will give you a form particularly prepared to insure vessels with the running down clause, and then they have it all on one policy without any rider. Other companies never issue it as a rider, but issue it as a distinct and separate contract; so that if you want insurance without collision you get one policy; if you want collision, you get another; if you want both, you get two.

Re-Cross Examination by Mr. RUSSELL.

×-*Q.* 53. In the case of an English vessel, if I understand you, taking out insurance, you would expect that insurance to cover three quarters of the running down? *A.* I would if I was told that they were seeking full insurance.

×-*Q.* 54. Full insurance would imply, of course, insurance against running down as well insurance against other loss? *A.* Full insurance would imply insuring three quarters running down as well as other loss.

×-*Q.* 55. Simple insurance would imply that? *A.* No. It would prompt an inquiry, I think. If you asked me to procure insurance on your hull, and you told me the amount and her name and her tonnage and her voyages, and her valuation, and all that, I would have to ask you the question, "Do you want the running down clause included"?

×-*Q.* 56. And that question would be equivalent to asking me whether I wanted full insurance? *A.* Yes; full in the ordinary acceptation of the word.

×-*Q.* 57. But an English vessel would not be fully covered unless she was insured against running down? *A.* No; in the true sense of the word, "fully", I don't think that she would.

×-*Q.* 58. Do you know anything about this steamer Barnstable? *A.* I didn't even know the name of the vessel until you mentioned it to me.

×-*Q.* 59. I am going to put to you a question that you may not then be able to answer. I am going to ask you what the premium for insurance would be on such a vessel at that time. *A.* I have no idea. I am not on that side — I am not in that part of the business;

I don't myself deal with the buying of insurance; I deal with adjusting matters.

×-*Q.* 60. Can you answer this question: What would be the difference in premium between insurance against the mere perils of the sea, and insurance including running down? *A.* I would not be an expert on that. I could guess at it.

×-*Q.* 61. What is your guess? *A.* May be one-quarter of the premium or one-fifth of the premium.

×-*Q.* 62. That is, it would increase the premium twenty or twenty-five per cent? *A.* Yes. I am far from being an expert on that.

[*Signature of witness waived.*]

DEPOSITION OF RAMON G. CADIZ.

Direct Examination by Mr. KIRLIN.

RAMON G. CADIZ, called on behalf of petitioner, being duly sworn, testifies as follows:

Q. 1. Mr. Cadiz, are you connected with the firm of Funch, Edye & Company? *A.* Yes.

Q. 2. What part of the business do you have charge of? *A.* Time chartering of West Indian business, Brazil business — the chartering for those trades.

Q. 3. How long have you had charge of that department? *A.* Since 1888.

Q. 4. How long have you been with the firm? *A.* Since June, 1876.

Q. 5. And is that the extent of your experience as a ship broker? *A.* That is the extent of my business career. I have never been in any place else.

Q. 6. [*Paper shown witness.*] Is this a copy of the time charter of your firm? *A.* Yes. That is our regular government form of time charter. [*Said paper offered in evidence and marked* "Barnstable Exhibit 19, May 8, 1897".]

Q. 7. I notice in that charter party a provision in the first numbered paragraph reading, "The owner shall pay for the insurance

of the vessel". Is that a usual clause in all time charters? *A.* Yes.

Q. 8. How does that clause come to be there?

Mr. RUSSELL. If he knows.

A. It is one of the clauses introduced for the purpose of establishing that the owner must pay the insurance on the vessel.

Q. 9. What is the occasion for enumerating that as a charge against the owner? *A.* Well, if it was not there, the charterer might, under paragraph No. 2, be called upon to pay the insurance on the vessel, on the strength of the clause stating that all other charges whatsoever, except those before stated, are to be for account of the charterers.

Q. 10. Is it generally recognized as a commercial matter that there is a regular charge for insurance? *A.* It is generally recognized that where a vessel insures, of course —

Q. 11. [*Interrupting.*] It would be charged for? *A.* It would be charged for. I never knew anything to the contrary.

Q. 12. And it is specified always who is to pay for it? *A.* It is.

Q. 13 (*by* Mr. RUSSELL). Insurance is not given away? *A.* No.

Q. 14 (*by* Mr. KIRLIN). And this is a specification as to who is to pay for it? *A.* Yes.

Q. 15. Is there any customary or trade meaning to those words, "The owner shall pay for the insurance on the vessel", which differs in any way from the ordinary meaning of the words? *A.* None whatever. Just the literal sense in which the expression is made use of there.

Cross Examination by Mr. RUSSELL.

×-*Q.* 16. Mr. Cadiz, that expression, I suppose, as is self-evident, means that the owner of a vessel is to assume, and therefore insure against, every risk that the vessel is likely to encounter?

Mr. KIRLIN. I object to that as inviting his conclusion on a matter of law.

A. Well, that is a hard question for me to reply to.

×-*Q.* 17. What is the difficulty there? *A.* I don't quite understand the import of it. Will you kindly read that again?

×-*Q.* 18. [*Question repeated.*] *A.* I should think so. If an

owner does not insure against it he assumes the liability for it himself — any liability for which his vessel is responsible.

×-*Q.* 19. And he relieves the charterer from that liability, does he not? [*Objected to as incompetent and as asking for a conclusion.*] *A.* I cannot say whether he would relieve him or not. That is beyond my knowledge of the insurance business.

×-*Q.* 20. Where a ship owner lets out his vessel on a time charter, and agrees in that charter that the ship owner shall pay for the insurance on the vessel, have you ever known a case where he has sought to recover from the charterer for a collision loss? *A.* No, I never knew of a case.

Re-Direct Examination.

Q. 21. Have your ever known of a case where that point was involved? *A.* No.

Q. 22. Has that ever come before you as a practical matter? *A.* It never came before me as a practical matter.

[*Signature of witness waived.*]

DEPOSITION OF JAMES R. HALL.

Direct Examination by Mr. KIRLIN.

JAMES R. HALL, called on behalf of petitioner, being duly sworn, testifies as follows:

Q. 1. Mr. Hall, with what firm are you? *A.* J. M. Ceballos & Company.

Q. 2. Were you formerly a member of the firm of W. W. Hurlbut & Company? *A.* I was.

Q. 3. When did you join that firm? *A.* About 1882.

Q. 4. How long have you been in business as a ship broker altogether? *A.* Since 1872.

Q. 5. Where before 1882? *A.* In Antwerp.

Q. 6. When did the firm of W. W. Hurlbut & Company cease to exist? *A.* It ceased to exist about December last year.

Q. 7. Were you and Bennett, who has been previously examined, formerly partners with Hurlbut? *A.* Yes.

Q. 8. And your firm separated when? *A.* In July, 1895, I think it was.

Q. 9. And then the firm of Bennett, Walsh & Company was formed? *A.* Yes.

Q. 10. And you continued business under the old name? *A.* Yes.

Q. 11. With whom? *A.* With W. W. Hurlbut.

Q. 12. Your old firm and the later firms had done the largest net chartering business in this port for some years? *A.* Yes.

Q. 13. [*Paper shown witness*]. Do you remember where this form which was used by W. W. Hurlbut & Company, and which has been marked as "Petitioner's Exhibit 16 for identification," was taken from, or by whom it was drawn up? *A.* I drew the form up myself.

Q. 14. Where from? *A.* From a copy of the time charter form of Messrs. Lambert & Holt, and also based on the charters made of the steamer Scythian and the steamers Pirate and Kenilworth.

Q. 15. When was this form drawn up by you? *A.* That form was drawn up shortly after we chartered the Scythian. That would be about 1886 or 1887, — somewhere about that time.

Q. 16. Referring to clause 22, that the owners shall pay for the insurance on the vessel, has that clause any commercial or trade significance differing in any way from the ordinary meaning of the word? *A.* No.

Q. 17. How does that clause come to be in the charter parties? Do you know? A. It is simply there so that if the owner wishes to protect himself he can do so by insuring the vessel.

Q. 18. Is there any commercial or trade understanding that the charterer is to have any benefit of such insurance? *A.* None at all.

Q. 19. Has the matter of the adjustment of liabilities as between owners and charterers on net form, where the charterers have furnished their own crew, ever come up for practical determination before the firm of W. W. Hurlbut & Company during the time that you were with it? *A.* No.

Q. 20. The matter as to mutual liabilities, or the significance or trade meaning of the insurance clause, was that ever up for consideration? *A.* No; not as regards the insurance point.

Q. 21. Do you notice in the third numbered clause the provision that the charterer shall pay "all other charges whatsoever" excepting those enumerated to be paid by the owner? *A.* Yes.

Q. 22. Is the charge for insurance an ordinary charge on all vessels? *A.* No. The owner is not bound to insure; he is not bound to.

Q. 23. What is the common practice? *A.* I should say most owners do insure.

Q. 24. And there is generally a charge to be borne by somebody, is there, for insurance premiums? *A.* It is naturally to be borne by the owner, if he thinks well to do so.

Q. 25. Is there any understanding or trade meaning attached to this phrase which imposes any obligation on the owner to insure? *A.* None at all.

Q. 26. Is there a well-known clause in charter parties to meet the case of an owner insuring for the benefit of a charterer if the charterer desires or requires it? *A.* I have seen such clauses.

Q. 27. Have you seen them in net forms? *A.* No; I have not seen them in net forms.

Q. 28. Have you seen them in any time forms? *A.* I have.

Q. 29. What steamers? *A.* I have seen some of the forms printed. I have never had any charter with it in.

Q. 30. Have you chartered any boats as broker that contained the insurance clause in a different form from what it was in the old Hurlbut net form? *A.* No; none at all.

Q. 31. Your clause has always stood in that form, has it? *A.* It has stood in that form.

Q. 32. Have you chartered any vessels on different forms in which the insurance clause was different? I mean to ask you about the Pirate and the Kenilworth. *A.* Those are the only two boats that I remember.

Q. 33. How about the insurance clause there, if you remember? *A.* The printing of it?

Q. 34. No, the way it was. *A.* If I remember rightly, it specially stipulated that the boats were to be kept insured, and that any damage done to the vessel over one hundred and twenty pounds, which was not covered by the policy; but any damage over one

hundred and twenty pounds recovered under the insurance policy, the charterers were to have the benefit of the insurance.

Q. 35. And how about the one hundred and twenty pounds? *A.* If the damage did not amount to that, then the charterers had to pay for the damage.

Q. 36. Do you know the firm of Frank C. Strick & Company, Limited, of London, Swansey, Cardiff, and Newport, England? *A.* Very well.

Q. 37. Is that an old firm? *A.* The firm has been in existence for some years.

Q. 38. Do you know Mr. Strick? *A.* I know Mr. Strick personally.

Q. 39. What has his experience been? *A.* Mr. Strick's has been for the last thirty or thirty-five years.

Q. 40. [*Paper shown witness.*] Look at the clause in his form of charter party, which was marked "Petitioner's Exhibit 15 for identification," and say whether the provision there about insurance and giving the charterers the benefit of it is the clause that you had in mind in testifying that when it was intended the charterer was to have the benefit of the insurance it was so stated? *A.* Yes; I have seen similar clauses.

Q. 41. You have seen that in other forms also? *A.* Yes.

Cross Examination by Mr. RUSSELL.

×-*Q.* 42. Mr. Hall, if I understand you, you prepared this form of charter party? *A.* Yes.

×-*Q.* 43. When did you prepare it? *A.* I think it was about 1884 or 1886. I could not remember the date exactly.

×-*Q.* 44. Is it prepared especially for British vessels? *A.* It was prepared for any vessels which were being chartered — not for British alone, but we had previously chartered American vessels as well.

×-*Q.* 45. And I suppose I may assume that you prepared it carefully? *A.* Well, to the best of our ability.

×-*Q.* 46. And in preparing it as a commercial document, you meant that every clause and word of it should have some meaning? *A.* Naturally.

×-*Q.* 47. And when in clause 10 you provided that the charterer was to indemnify the owner from all consequences or liabilities that may arise from the master signing bills of lading, you intended to that extent to put the liability upon the charterer and to relieve the owner, did you not? *A.* Allow me to look at the clause, please. Certainly, from signing bills of lading.

×-*Q.* 48. You thought that provision was necessary, did you not? *A.* No. As a matter of fact, it does not protect the owner — even the master signing the bills of lading in that way.

×-*Q.* 49. I am not asking you exactly that; my question is whether or not, when you put that clause into the charter party, you did not mean to define the extent of the liability as ship owner and limit it? *A.* No.

×-*Q.* 50. Well, what did you mean by the words? *A.* Well, I can't exactly say that it was any more than a common phrase used in making time charters.

×-*Q.* 51. But it was used for a purpose, wasn't it? *A.* Well, just the ordinary way that these forms have been drawn up. It is for the Court to decide as to the liability.

×-*Q.* 52. But, as a commercial man and a ship broker, you understand the English language, do you not? *A.* We try to the best of our ability to.

×-*Q.* 53. When you use it in a commercial contract you use it to mean something? *A.* We try to.

×-*Q.* 54. And the meaning was to that extent that the liability of the owner was limited? *A.* As far as the bills of lading were concerned.

×-*Q.* 55. Exactly. Now, when you drafted the insurance clause, you intended, did you not, that the owners, in paying for the insurance, should either insure or assume the liability? *A.* Oh, no. I have known cases where boats have been chartered on such a form and where the owners did not insure.

×-*Q.* 56. I do not make my question, perhaps, clear. The owner either insures or assumes the liability, doesn't he? *A.* Not necessarily.

×-*Q.* 57. When the charter party provides that the owner shall pay for the insurance on the vessel, doesn't it mean that the risk is on the owner? *A.* It doesn't say that he is to insure.

×-*Q.* 58. I do not claim that it does. But isn't the risk on the owner? [*Objected to as a conclusion.*] *A.* I can't see why it should be, because it is his option whether he insures or not.

×-*Q.* 59. When the charter party provides that the owner shall pay for the insurance on the vessel, do you understand that the owner has any insurable interest? [*Same objection.*] *A.* That is entirely an owner's option.

×-*Q.* 60. You do not understand my question. *A.* Well, it is for an owner to decide what he is to do. I cannot assume what an owner would do.

×-*Q.* 61. I am asking you as the man who drafted this contract, and I assume that you knew what you were doing when you used the English language. Did you or did you not assume from that, when you drafted it, "that the owner should pay for the insurance on the vessel", that the owner retained an insurable interest? *A.* No. It was left entirely to an owner whether he insured or not; it was his option.

×-*Q.* 62. You do not understand my question. Did the owner have an insurable interest? *A.* Oh, he had an interest he could insure if he wished.

×-*Q.* 63. Now, what was that interest? *A.* I suppose he might insure the value of the ship.

×-*Q.* 64. And insure her against running down? *A.* Not necessarily.

×-*Q.* 65. I am not asking whether it was necessary to do it, but was not that an insurable interest he had in her? *A.* He could do so.

×-*Q.* 66. He had an insurable interest for that purpose? *A.* He could do so. He could insure that interest if he wanted.

×-*Q.* 67. And he had that interest to insure if he wanted to? *A.* Oh, decidedly.

×-*Q.* 68. Now, Mr. Hall, have you ever known a case where a ship owner, having agreed to pay for the insurance on the vessel, made a claim on the charterer for any damages suffered by running down? *A.* No.

Re-Direct Examination.

×-*Q.* 69. Have you ever known of this coming up at all as a practical matter? *A.* No.

[*Signature of witness waived.*]

DEPOSITION OF HERBERT BARBER.

Direct Examination by Mr. KIRLIN.

HERBERT BARBER, called on behalf of petitioner, being duly sworn, testifies as follows:

Q. 1. Mr. Barber, how long have you been in the business of steamship agent and broker in New York? *A.* Sixteen years.

Q. 2. What is your firm? *A.* Barber & Company.

Q. 3. How long have you been in the shipping business altogether? A. Thirty-five years probably.

Q. 4. Whereabouts before you came to New York? *A.* Liverpool.

Q. 5. [*Witness is shown Petitioner's Exhibit 7 for identification.*] Is that your form of time charter? *A.* That is one of our forms of time charter, yes.

Q. 6. I notice in the clause numbered 1, in that form, a provision that the owners shall pay for the insurance of the vessel. Is that the usual form that is in all time charters? *A.* That is the usual clause.

Q. 7. And the form of it? *A.* Yes.

Q. 8. Do you know Hurlbut & Company? *A.* I used to know them.

Q. 9. Look at clause 22 in their form and say whether that is the same clause and in the same form? *A.* It is the same clause, but not in the same sequence.

Q. 10. Not in the same sequence? *A.* No.

Q. 11. But the same in words, is it not? *A.* Yes; same exact words.

Q. 12. How does that clause come to be in time charters? *A.*

You know in most time charters there is a clause about what each shall pay for. The owners shall pay for the provisions, wages, fees of the captain, officers and crew; and then the next clause is, the charterer shall provide and pay for all the coals, port charges, pilotages, commissions, consulate fees except those pertaining to the captain, officers and crew, and all other charges whatsoever; and for that reason, under clause 1, they provide that the insurance of the vessel is to be paid by the owners.

Q. 13. That being a usual charge on all vessels? *A.* Insurance is a usual charge; yes.

Q. 14. Is there any trade meaning or interpretation of that clause, differing in any way from the ordinary meaning of the words? *A.* Not that I am aware of.

Q. 15. Is there any trade meaning or interpretation to the effect that charterers shall have the benefit of any of the owners' insurance? *A.* Well, that means that if the steamer is not insured, any benefit that the charterers might derive under certain claims. However, you will notice that better in some of the other charters that are around, where that clause is more fully expressed.

Q. 16. In the form in which you have it, does the charterer by any common usage get any benefit of the owner's insurance? *A.* No; I don't think so. No.

Q. 17. Now, if the charterer desires the benefit of the owner's insurance, is there a provision for that made? *A.* In some charters it is made.

Q. 18. Do you know the firm of Strick & Company, of London and Swansey? *A.* I know them by reputation.

Q. 19. Look at the clause numbered 1 in their form, and say whether that is the clause you referred to as being where the charterer is to have the benefit of the insurance. [*Witness is shown Petitioner's Exhibit* 15 *for identification.*] *A.* That is a pretty strong clause; yes.

Q. 20. And so far as your experience goes there is no trade meaning or interpretation of the ordinary clause that the owner shall pay for the insurance of the vessel differing in any way from the plain meaning of the words? *A.* Not that I am aware of.

Cross Examination by Mr. RUSSELL.

×-*Q.* 21. That is, if I understand you, Mr. Barber, where the owner agrees to pay for the insurance he has the benefit of the insurance? *A.* That is so; yes.

×-*Q.* 22. And if the charterer is to have any interest in that insurance it must be so provided expressly? *A.* That is my understanding of it; yes.

×-*Q.* 23. And the owner paying for the insurance would be supposed to assume the risk and insure himself, wouldn't he? [*Objected to as a conclusion.*] *A.* That is so; yes.

×-*Q.* 24. And that is the commercial meaning of the expression in the charter party that the owner shall pay for the insurance of the vessel? *A.* That is as I understand it.

×-*Q.* 25. Have you ever known a case where a time charter party provides that the owner shall pay for the insurance on the vessel, and where the owners have made any claim against the charterer for a running down loss? *A.* I have not known of such a case; no.

Re-Direct Examination.

Q. 26. Have you known of any case where a vessel has been run down through the negligence of the charterer's master? *A.* I don't know of a case.

Q. 27. Then that question has never come up before you for practical determination? *A.* It has not; no.

[*Signature of witness waived.*]

From said March Term, A. D. 1897, this libel was continued from term to term to the December Term thereof, A. D. 1897, when on the twenty-fifth day of January, A. D. 1898, it was ordered by the Court that the statutory continuance be vacated, and the case restored to this term.

From said December Term, A. D. 1897, this libel was continued to this present term, when on the seventeenth day of March, A. D. 1898, the following final decree was entered by the Hon. Arthur L. Brown, District Judge for the District of Rhode Island, duly assigned to hold the District Court for this district.

FINAL DECREE.

This cause came on to be heard, and an interlocutory decree having been entered therein, according to the opinion on file, it is now hereby ordered, adjudged and decreed in the above libel and petitions that judgment be entered for the following libellants and petitioners against the steamship Barnstable for damages in the following amounts:

Libellants, A. G. Hall *et al.*, damages,	$14,055 00	
Interest from January 1, 1897, to March 10, 1898	1,004 93	
Total		$15,059 93
Petitioner, Arthur W. Nunan, damages,	$2,095 00	
Interest from January 1, 1897, to March 10, 1898	149 79	
Total		$2,244 79
Petitioners, Harold Emerman *et al.*, Admrs. *et al.*, damages	$2,850 00	
Interest from January 1, 1897, to March 10, 1898	203 78	
Total		$3,053 78
Petitioner, Israel B. Stewart, Admr., damages	$475 00	
Interest from January 1, 1897, to March 10, 1898	33 96	
Total		$508 96
Total		$20,867 46

It is further ordered, adjudged and decreed that judgment be entered for said libellants and petitioners against the steamship Barnstable for costs as taxed by the clerk in the sum of $69.65 dollars.

It is further ordered, adjudged and decreed that the petition of the Turret Steamshipping Company, Limited, against the Boston Fruit Company be dismissed with costs, and that judgment be entered for said Boston Fruit Company for costs as taxed by the clerk in the sum of $69.30.

And it is further ordered, adjudged and decreed that unless the amounts hereinbefore set forth of the respective judgments both for

costs and damages shall be paid to said parties or their proctors of record by the said steamship Barnstable, or her owner or claimant, within ten days from the date hereof, or unless further proceedings shall have been stayed by appeal or by other order of this court before the expiration of said ten days, then execution shall issue for said amounts against the claimant and its stipulators for costs and value.

On the twenty-fifth day of March, A. D. 1898, the following prayer for appeal and assignment of errors were filed in the clerk's office, viz:—

PRAYER FOR APPEAL.

The Turret Steamshipping Company, Limited, claimant for the steamship Barnstable, and petitioner against the Boston Fruit Company in the above-entitled proceedings, considering itself aggrieved by the final decree of this Court made and entered in this cause, on or about the seventeenth day of March, 1898, hereby appeals from said final decree and decision to the United States Circuit Court of Appeals for the First Circuit, and herewith files an assignment of errors, as required by law.

And thereupon said Turret Steamshipping Company, Limited, prays that its said appeal may be allowed, and that a transcript of the record, testimony, proceedings and papers on which said final decree was made may be sent up, duly authenticated, to the said United States Circuit Court of Appeals for the First Circuit, and that a citation in due form be issued, citing the petitioning libellants and the said Boston Fruit Company to appear in answer to the said appeal.

TURRET STEAMSHIPPING COMPANY, LIMITED,
by CONVERS & KIRLIN, *its Proctors.*

ASSIGNMENT OF ERRORS.

The Turret Steamshipping Company, Limited, claimant of the steamship Barnstable, and petitioner against the Boston Fruit Company, assigns error to the final decree and decision of the District Court herein, in the following particulars:

First. For that the Court held that the rights of the parties, as between the steamship and the charterer, were not to be determined with reference to the law of bailments.

Second. For that the Court held that the twenty-second clause of the charter party was an unequivocal expression of an intention that the steamship, as between her owner and the charterer, should assume and relieve the charterer from all risks that would be covered by "the insurance on the vessel" for which the owner was to pay.

Third. For that the Court held that the twenty-second clause of the charter party, which provided that the owner should pay for the insurance on the vessel, required the owner to arrange for and obtain insurance on the vessel, or, if it failed so to do, to be liable, as between it and the charterer, for all risks which would have been covered by such insurance, even though occasioned by the negligence of the charterer's servants.

Fourth. For that the Court held that the undertaking of the owner, under clause 22 of the charter, to pay for the insurance on the vessel, required the owner to obtain insurance, not only on the vessel herself, but against running down risks, including loss of life and personal injury in such amount as would fully relieve the charterer from any claim for damage caused by the steamship to a third vessel, or for any loss of life or personal injury claims arising from such running down, even though occasioned by the negligence of the charterer's servants.

Fifth. For that the Court received evidence in support of the contention that the undertaking of the owner, under clause 22 of the charter party, to pay for insurance on the vessel, required the ship owner to insure, as between it and the charterer, against claims for damage done by the vessel to another vessel, and for personal injury and death claims arising from such running down, caused by the negligence of the charterer's servants.

Sixth. For that the Court received and gave weight to the evidence of William H. Bennett, that he had expressed to a former owner of the vessel, at the time the charter party was made, that he would have to pay for all insurance on the vessel in any way, shape and manner, against strandings and collisions, and everything, as is usually done on all vessels, unless he wanted to take the risk and

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not insure, when the evidence showed that the ownership of the vessel had changed from the hands of the owners referred to by said Bennet into the hands of the said Turret Steamshipping Company, Limited, which was not shown to have had any knowledge of such statement to the former owner.

Seventh. For that the Court held that other clauses of the charter party indicated an intent on the part of the owner to assume, as between it and the charterer, the risk of all consequences of collision, caused by the negligence of the charterer's servants.

Eighth. For that the Court held that although evidence of custom could be received to show that an insurance "on the vessel" contemplated an insurance against claims arising from injuries inflicted by the vessel upon a third vessel, or upon persons on board thereof, yet the evidence that such custom was to insure only three quarters of such risks does not affect materially the intention of the parties concerning the risks which the ship owner was to pay for and insure against.

Ninth. For that the Court held that clause 22 of the charter party was the legal equivalent of a clause requiring the owner to pay for the insurance on a vessel against all risks, including protection and indemnity and freight and demurrage club protection, and to give the charterer the full benefit of the same, as if it was, for the time being, owner of the ship.

Tenth. For that the Court held that under clause 22 of the charter party the owner agreed to insure against and to bear the risks of liability for damage to third vessels and to persons on board thereof, which might arise from or be caused by the negligence of the charterer's servants.

Eleventh. For that the Court held that the owner had received compensation from the charterer for the risk of damage caused to third vessels, or to persons on board thereof, by reason of the negligence of the charterer's servants.

Twelfth. For that the Court refused to enter a decree under the intervening petitions of Emernan and others, administrators, and Stewart, administrator, against the Boston Fruit Company, as well as against the "Barnstable".

Thirteenth. For that the Court refused to enter decrees pursu-

ant to the provisions of the fifty-ninth rule, in all the cases, against the Boston Fruit Company, as well as against the Barnstable, containing a provision that, as between the steamship owner and the charterer, the decrees should be paid by the charterer, and permitting recovery against the Barnstable and her sureties only in the event of the inability of the libellants to collect their damages from the Boston Fruit Company, charterer.

Fourteenth. For that the Court omitted and refused to enter a decree in accordance with the prayer of the petition of the Turret Steamshipping Company, Limited.

CONVERS & KIRLIN,
Proctors for TURRET STEAMSHIPING COMPANY, LIMITED,
Appellant.

From the foregoing decree, the respondents having claimed an appeal to the United States Circuit Court of Appeals for the First Circuit, no appeal bond being required by the Court, both parties consenting, on this twenty-fifth day of March, A. D. 1898, said appeal is allowed by the Court.

A true record:

Attest: FRANK H. MASON, *Clerk.*

DISTRICT COURT OF THE UNITED STATES,
DISTRICT OF MASSACHUSETTS.

IN ADMIRALTY.

A. G. HALL ET AL. *v.* THE STEAMSHIP BARNSTABLE.

PETITION OF THE TURRET STEAMSHIPPING CO., L'T'D (*Owner*)
v.
THE BOSTON FRUIT COMPANY (*Charterer*).

OPINION OF THE DISTRICT COURT.

JANUARY 25, 1898.

BROWN, J. In the controversy between the owner and charterer it is assumed that the Barnstable is liable *in rem* for a total loss of the fishing schooner Fortuna in a collision caused by the fault of

those in charge of the navigation of the Barnstable. It is agreed that the master, officers, engineers, firemen and crew of the steamer had been appointed by the charterer, and were paid by the charterer pursuant to the charter party.

It is also agreed that "the collision was caused by the negligence of master, mates or crew at the time in charge of the navigation of the steamship."

The result sought by the owner is thus stated upon the brief supporting the petition upon which the charterer has been cited in by the owner.

"A decree should be entered for the libellants against the Barnstable and the Boston Fruit Company (the charterer), for the damages sustained; but the decree should provide that the damages be collected in the first instance from the charterer, and that only the amount not so collectible be paid by the ship; and the decree should further provide for a recovery over against the charterer in favor of the ship owner, of any amount it may have to pay; and the ship owner should recover costs."

Without dwelling upon the grounds for doubting the right of the owner, who has appeared as claimant in a proceeding *in rem*, to proceed by petition against the charterer in this a cause of collision, and merely recording a doubt of the propriety of the practice in view of Admiralty Rule 15, and of the express limitation of Rule 59, we will examine only those questions that have been argued.

I am of the opinion that the owner has satisfactorily sustained its contention that the charter party vested the possession, command and control of the vessel in the Boston Fruit Company and its servants, and that the navigation of the vessel was the charterer's business.

The main question, therefore, is, were the relations between the owner and the charterer such as to impose upon the charterer the obligation to indemnify the owner in case the vessel, as the instrument of damage, should be subjected to a lien through the negligence of those appointed by the charterer to manage her navigation?

The owner contends that this right to indemnity rests upon the general principles of the law of bailments.

The case of *Smith* v. *Bouke*, 40 Fed. Rep. 839, 49 Fed. Rep. 954, is cited in support of the proposition that a charterer of a hired

ship must pay for its loss through his fault. This rule, it is argued, must also require the charterer to pay for its damage received by collision; and if the collision, instead of injuring the hired vessel, gives rise to a lien upon her for damage to another vessel, that the charterer must logically be bound to discharge the lien; that the rule requiring the return of the vessel undamaged must also require its return without impairment to or lien upon the title. *The Alert*, 40 Fed. R. 836; *The Centurion*, 57 Fed. R. 412.

The charterer denies its liability to indemnify the owner; contending that the general principles of the law of bailments are inapplicable, since by the charter party the owner and charterer have entered into special contractual relations which preclude the owner from calling upon the charterer for indemnity for risks, and which cast the loss ultimately upon the owner.

No case has been cited as a precedent, and the lack of legal precedents, considered in connection with the testimony of witnesses of long experience, that a claim like the present by an owner against a charterer is unknown in the shipping business, raises an inquiry whether the hazards to which vessels are exposed, and the peculiar law that renders the vessel liable regardless of ownership or control, have not led owners and charterers to a different usage from that prevailing in the hiring of chattels not by their nature exposed to special hazards, and not the subject of liens imposed by the hirer and valid against the owner. If the rules in ordinary bailments have been considered by owners and charterers practical rules applicable to their business, it is remarkable that no instance can be cited in which they have been practically applied.

The parties are presumed to contract with reference to existing rules of law and known usages, and in my opinion we are required, in order to arrive at a proper construction of the charter party, to give weight to those elements that do not exist in ordinary bailments.

In the case of *French Republic* v. *World's Columbian Exposition*, 83 Fed. Rep. 109, it was said:

"The rules relating to bailments, such as the varying degrees of care required of bailees for hire, bailees for accommodation of bailor, and bailees for mutual advantage, do not, satisfactorily to one's sense of the fitness of things, exactly point out the law applicable to the

case under consideration. The relation is in many respects different in character and *in the just expectations* entertained by mankind, from the ordinary private transactions that constitute the usual bailment."

The presumption that a hired chattel will be restored uninjured, and without impairment to the value of the title, forms a part of the understanding of the parties in ordinary bailments. If a like presumption of fact exists in an ordinary case of hiring a vessel, it must be weaker in the degree that the just expectation of loss is stronger.

The weaker the presumption of a safe return, the greater the risk that was in the contemplation of the parties at the time of contracting, the stronger the inference that the contract is affected in all its provisions by the risk, and that it provides therefor.

As to the special risk in question the owner contends that the contract is silent. The charterer contends that the contract speaks expressly.

Bearing in mind the importance of the question of risk of loss, and the fact that nowhere does the contract provide in terms that the owner shall be indemnified by the charterer, or relieved from the risk of loss to which merely by the relation of owner he is exposed, and seeking for direct expressions of the intention of the parties as it existed at the time of contracting, we find the stipulation, "22. The owner shall pay for the insurance on the vessel."

Insurance has been described as "a fixed sum as the price of risk". The parties were contracting with express reference to risks capable of estimate in money. In construing the charter party we should not be confused by the fact that a large loss has occurred. What is now a loss was at the time of contracting merely a risk — the risk (as a commercial consideration) a mere money charge.

This express assumption by the owner of the cost of indemnity, I regard as a most unequivocal expression of an intention to assume and to relieve the charterer from all risks that would be covered by "the insurance on the vessel" for which the owner was to pay.

Upon the opposite view an owner who for a valuable consideration has agreed to bear the cost of indemnity may throw that cost upon the charterer, provided the risk existing at the execution of the contract subsequently matures into loss.

This is entirely inconsistent with the owner's contention that this clause, commonly employed in charters of various kinds, is used in accordance with a common scheme of dividing the "fixed charges" between the owner and charterer.

If, as argued upon the petitioner's brief, insurance is to be regarded as a fixed charge, appertaining to the vessel, according to a general practice to have vessels insured, and there is a general scheme to distribute the fixed charges pertaining to the vessel, the owner assuming some, the charterer others, then it must follow that both should share in all benefits accruing from the payment of the fixed charges upon the vessel.

Counsel for the owner contends that the fundamental fallacy in the respondent's argument lies in the assumption that because the charter shows that the owner wants insurance against his own risks, he also means to insure the charterer's risks and to assume them.

In reply to this criticism, it may be said that the owner's argument involves the fallacy of a shifting of premises and of treating the insurance, *first*, as relating to the vessel and to the joint enterprise of owner and charterer, and, *secondly*, as relating merely to the respective individual risks of owner and charterer, and that the argument involves also an assumption that the risk of a lien upon the vessel as an offending *res* is not an owner's risk that should be insured against by the owner through a policy that might be described as insurance on the vessel. The fact that a charterer may be liable *in personam* to third persons does not change the owner's risk that one injured may elect to proceed *in rem*.

As a guide to construction I adopt the view suggested by the counsel for the owner, that the parties in forming their contract regarded themselves as embarking in a joint enterprise to which, for their joint benefit, certain sums must be contributed for fixed charges or necessary expenses. These expenses were necessarily incurred that the ship might work to the profit of both owner and charterer. Among these fixed charges was "insurance on the vessel".

The owner's brief and the evidence of a general usage to insure lead to this view.

The assumption of any one of the fixed charges by either party is

an agreement to relieve the other of that expense and not to call upon him to pay that charge.

The agreement of the owner "to pay for the insurance upon the vessel" is an express agreement to assume and not to call upon the charterer to pay this expense. "To pay for the insurance upon the vessel" is to pay a sum for a purpose, — to reduce an indefinite risk of future loss to a mere present definite expense. The owner therefore contracts upon the basis of a known and definite expense. The price which the charterer pays the owner is full consideration for the expense assumed by the owner for insurance as well as for the use of the vessel. This is the legal effect of the charter party. In substance, therefore, the contract price paid by the charterer includes full repayment to the owner of the price of insurance.

As the charterer in this way has already borne the expense of insuring the vessel, has paid to the owner the price of risk, or cost of indemnity, according to the terms of the contract, the owner cannot call upon the charterer to pay it again. Especially would it be a violation of clear intention to compel the charterer to pay the cost of indemnity, when through actual loss that cost has become greatest.

The charterer having contracted on the basis of risk, and having satisfied the owner forhis risk by a money payment, has, so far as the owner is concerned, stopped the running of the risk against himself.

If the owner has observed the terms of his agreement he has obtained by the consideration that the charterer has paid him his indemnity against loss. The charterer has paid him what the contract makes the equivalent of the present loss. Upon every legal and equitable consideration, therefore, the charterer is relieved.

The remaining question is, What is included in the phrase "insurance on the vessel"?

The phrase seems broad enough to include insurance of every kind that in the expectation of the parties properly appertained to their joint enterprise.

Upon the owner's brief it is claimed:

"If the fruit company intended that the insurance clause should have the effect of giving it the benefit of the owner's insurance, presumably it would have adopted the following or an equivalent form of words."

"*The owners* * * * *shall pay for the insurance on the vessel* against all risks, including protection and indemnity and freight and demurrage club protection, giving charterers full benefit of same as if they were for the time being owners of the ship."

This, a form in practical use, is itself an example of the use of the term *the insurance on the vessel* as comprehending risks of every character, since the subsequent part of the sentence is a mere specification of what is comprehended in the previous general language. There is also testimony from the claimant's witness Gourlie tending to show that such a clause would ordinarily be held to include three quarters of a collision risk, including running down.

Furthermore it has been proved by the charterer, and is not disputed, that the actual understanding of the owner at the execution of the contract was that the phrase included insurance against risks of all kinds.

William H. Bennett, who as broker negotiated the charter for the owner and charterer, testifies as follows:

"I have had a good deal of experience in various insurance claims * * * so much so that I clearly expressed to the owner that he would have to pay for all insurance on the vessel in any way, shape and manner against stranding, collisions and everything as is usually done in all vessels, unless he wanted to take the risk and not insure."

The owner objects on the ground that this evidence is incompetent. In my opinion, however, the evidence was admissible. It did not vary, add to or contradict the writing, but only interpreted and made certain its terms. *Lonergan* v. *Buford*, 148 U. S. 581, 588.

"If the language of the document, though plain in itself, applies equally well to more objects than one, evidence may be given both of the circumstances of the case and of statements made by any party to the document as to his intentions in reference to the matter to which the document relates." 7 Am. & Eng. Enc. of Law, 93.

Many other provisions of the contract have been urged by counsel for the charterer in proof of the owner's intention to assume the insurable risks pertaining to the vessel. That the owner assumed the risk of damage to his vessel, and could not call upon the charterer to repair her or indemnify him for such loss is very clear. There are express agreements that lead to this conclusion without

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recourse to the provision concerning insurance. He is to maintain her in a state of repair, and the hire is to abate during time lost by collision.

There is great force in the argument that since the vessel, if damaged by this collision, would have immediately been at the expense of the owner for repairs, with an abatement of price during the time lost in repairs, that the parties contemplated faults in navigation and that there was a general intent to assume the risk of all consequences of collision, and no intent to make a distinction between receiving and inflicting damage.

It is clear upon the face of the charter party that the owner assumed one consequence of a collision caused by the fault of the charterer's servants and agreed to bear the expense of insuring against it, and it is fair to infer that he also contemplated the other consequence of the same fault as a proper subject for insurance.

As the whole risk was insurable, evidence of a custom to insure only three quarters does not, in my opinion, affect materially the question of intention. In considering this question I do not lose sight of the doctrine of the case of *General Mutual Ins. Co.* v. *Sherwood*, 14 How. 364, cited upon the owner's brief.

Though the loss in the present case was the result of a collision, with the added element of the negligence of the charterer's servants, yet the owner was liable to loss from such causes and could insure against it.

As the contracting parties both understood that the vessel was to be under the charge of a master who, though appointed by the charterer, was to be satisfactory to the owner, as the possible liability of the charterer to third persons for the master's fault would rest not upon the charterer's personal fault, but merely upon an imputed responsibility; as the charterer's and owner's business both required that the vessel should be set in motion, and thereby become exposed to the danger of a lien as an offending *res*, I see no reason arising from public policy why the owner and charterer should not agree between themselves as to which should bear the expense of indemnity against such an anticipated loss.

When the joint business of two persons requires the agency of a third who is to have a large sphere of independent action, not under

the personal supervision of either, I see no reason why they should not, in fixing the terms of their agreement, contemplate that this third person through negligence might cause a loss; estimate the risk at the cost of insuring against it, and fix the contract price accordingly.

It is conclusively settled in this country and in England that a policy of insurance taken out by the owner of a ship or goods covers a loss by perils of the sea or the perils insured against, although occasioned by the negligence of the master or crew or other persons employed by himself. *Phenix Ins. Co.* v. *Erie & Western Transportation Co.*, 117 U. S. 312, 323; *Orient Ins. Co.* v. *Adams*, 123 U. S. 67, 72; *Liverpool & Great Western Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 438; *California Ins. Co.* v. *Union Compress Co.*, 133 U. S. 387, 415.

If indemnity insurance is lawful and proper, there should arise in construing the charter party no presumption that the parties did not intend it.

In *Orient Ins. Co.* v. *Adams*, 123 U. S. 67, 72, the Court quotes *American Ins. Co.* v. *Insly*, 7 Penn. St. 223, 230.

"Public policy requires no more than that a man be not suffered to insure against his own knavery, which is not to be protected or encouraged by any means, for though the maxim *respondeat superior* is applicable to the responsibility of a master for the acts of his servants, yet the insured, so long as he acts with fidelity, is answerable neither for his servants nor for himself."

These principles are equally applicable in construing the contract between the owner and charterer.

As in this country liability attaches by law to the vessel as an offending *res*, regardless of the relations of the owner and those in control, it is natural that the parties should consider the vessel as so liable, and contract on that basis.

From the language of the charter party, and from the evidence that the phrase "insurance on the vessel" was used with an actual intention to cover what, according to its literal terms, it was capable of covering,— running down risks as well as risks of direct injury,— I am satisfied that the intention of the parties was that the owner should bear the risks of that primary liability to which his relation

as owner exposed him; and that according to the legal effect of the charter party he has received compensation for his risk from the charterer.

Having received full compensation for risks, he has likewise received full compensation for all that at the time of contracting was potentially within the risk for which he has been paid.

The petition of the Turret Steamshipping Company, Limited, against the Boston Fruit Company, is therefore dismissed with costs.

Upon the main case a decree may be entered for the libellants against the vessel for the sum of $19,475, with interest from Jan. 1, 1897, and for their costs.

UNITED STATES CIRCUIT COURT OF APPEALS

For the First Circuit.

A. G. Hall et al. *v.* the Steamship Barnstable.

Arthur W. Nunan, Petitioner, *v.* The Steamship Barnstable.

Harold Emernan et al., Administrators, Petitioners, *v.* The Steamship Barnstable and the Boston Fruit Company.

Israel B. Stewart, Administrator, Petitioner, *v.* The Steamship Barnstable and the Boston Fruit Company.

Turret Steamshipping Company, Limited, Petitioner, *v.* the Boston Fruit Company.

It appearing from the records of the Court in this case, that the claimant, the Turret Steamshipping Company, Limited, has filed a duly approved stipulation for value herein, with sureties, to abide the decree, in the sum of twenty-five thousand dollars ($25,000), an amount in excess of the final decree herein, and of the probable costs of the appeal, and that said stipulation provides that the stipulators are bound in the said sum, conditioned that the claimant shall abide by and pay the money awarded by the final decree rendered in the cause in the District Court, or, in case of appeal, by the appellate

court, as will more fully appear by reference to the said stipulation, now, on motion of the claimant, —

It is ordered that no further bond on appeal is required, and that the said stipulation to abide the decree stand as a bond for costs, and as a supersedeas on this appeal, with leave to the libellants, and to the Boston Fruit Company, however, to re-examine the sureties if desired; and, if they are found to be unsatisfactory, —

It is further ordered that the claimant shall furnish such other sureties thereon, or such further bond, as a further order of this court or of the appellate court may direct.

Dated March 25, 1898.

ARTHUR L. BROWN,
United States District Judge.

We hereby consent to the entry of the foregoing order herein.

CARVER & BLODGETT,
Proctors for Libellants and Petitioners,
RUSSELL & RUSSELL,
Proctors for the BOSTON FRUIT COMPANY.

CITATION ON APPEAL.

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES, BY THE HONORABLE ARTHUR L. BROWN, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF RHODE ISLAND, DULY ASSIGNED TO HOLD THE DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS,

To A. G. HALL *et al., Libellants, against Steamship Barnstable; to* ARTHUR W. NUNAN, *Petitioner, against the Steamship Barnstable; to* HAROLD EMERNAN ET AL., *Administrators, Petitioners, against the Steamship Barnstable and Boston Fruit Company; to* ISRAEL B. STEWART, *Petitioner, against the Steamship Barnstable and the Boston Fruit Company, and to the* BOSTON FRUIT COMPANY, GREETING:

Whereas the Turret Steamshipping Company, Limited, claimant of the steamship Barnstable, petitioner against the Boston Fruit Company, has appealed to the United States Circuit Court of Appeals, for the First Circuit, from the final decree rendered in the District Court of the United States for the District of Massachusetts, made in your favor against the said steamship Barnstable, and filed in the office of the clerk of said court on or about the seventeenth day of March, 1898, and has filed an assignment of errors and petition of appeal and supersedeas as required by law, you are therefore hereby cited to appear before the United States Circuit Court of Appeals,

at the city of Boston, on or before the twenty-first day of April, 1898, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, this twenty-fifth day of March, 1898.

ARTHUR L. BROWN,
U. S. District Judge.

CONVERS & KIRLIN,
Proctors for Appellant.

We accept service of the within citation.

BOSTON, March 26, 1898.

CARVER & BLODGETT,
Proctors for Libellants.

RUSSELL & RUSSELL,
Proctors for BOSTON FRUIT COMPANY.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

I, Frank H. Mason, Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing is a true copy of the record and all proceedings in the cause in admiralty entitled,

No. 760.

A. G. HALL ET AL., LIBELLANTS,

v.

THE STEAMSHIP BARNSTABLE,

in said District Court determined, the opinion of the District Court of January 25, 1898, the assignment of errors and agreement of parties that no appeal bond be given, with the order of court thereon, and also the original citation issued upon the appeal of the respondent (claimant of the steamship Barnstable), with the acknowledgment of service thereon, except the exhibits (numbered 1 to 19 inclusive) which are omitted from this record, pursuant to agreement of parties filed in court March 26, 1898, an attested copy thereof being annexed hereto.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said district, this twenty-first day of April, A. D. 1898.

[SEAL] FRANK H. MASON, *Clerk.*

UNITED STATES DISTRICT COURT,

DISTRICT OF MASSACHUSETTS.

IN ADMIRALTY.

HALL ET AL.

v.

THE BARNSTABLE, *and other Petitions filed in the same case.*

STIPULATION IN REGARD TO RECORD.

It is hereby consented and agreed that the following original exhibits be transmitted by the clerk of this court to the Circuit Court of Appeals, for the use there, by either party, instead of copies thereof being inserted and printed in this record, namely: The bundle of charter parties being exhibits numbers 1–19 inclusive, enclosed in cover marked "Petitioner's Exhibits for identification."

And it is further consented that any necessary order may be made hereon, accordingly, at any time, without notice.

BOSTON, March 26, 1898.

CARVER & BLODGETT,
Proctors for Libellants.

CONVERS & KIRLIN, *Proctors for*
TURRET STEAMSHIPPING COMPANY, LTD.

RUSSELL & RUSSELL,
Proctors for BOSTON FRUIT COMPANY.

A true copy:

Attest: FRANK H. MASON,
Clerk.

103 United States Circuit Court of Appeals for the First Circuit, October Term, 1898.

THE BARNSTABLE.

TURRET STEAMSHIPPING COMPANY, LIMITED, Claimant of the Steamship Barnstable, Appellant,

v.

A. G. HALL ET AL., Late Owners of the Schooner Fortuna, Libellants; Arthur W. Nunan, Petitioner; Harold Emernan *et al.*, Administrators, *et al.*, Petitioners; Isaac B. Stewart, Administrator, Petitioner, and Boston Fruit Company, Charterer of the Steamship Barnstable, Respondent, Appellees. } No. 249.

Appeal from the district court for the district of Massachusetts.

Before Putnam, Webb, and Aldrich, JJ.

Opinion of the Court.

May 11, 1899.

WEBB, *J.*:

Little need be added to the careful opinion of the district judge in this case, which is a case of contract between the owners and the charterers of the steamship Barnstable. There can be no controversy as to the terms of the charter, for it is in writing and
104 is in evidence. The difference relates to the 22nd article of the charter, which is in these terms: "The owners shall pay for the insurance on the vessel." What are the obligations imposed by this provision of the contract?

In argument there has been some discussion concerning the mutual relations, under the charter, between the parties. The owners contend that the charterers were bailees and held to all the liability of bailees, and this contention the charterers controvert. We do not think that the determination of that question will aid in the decision of the case. For whether or not, in the full and strict sense, the charterers were bailees, they would be, independently of this insurance clause, chargeable with some of the risks of the ship, while the owners would bear others. Assumption by the owners of insurance against risks affecting themselves alone,

would be of no advantage to the charterers, who would in no event be answerable for losses arising from such risks, and had no interest in insurance against such losses.

The insertion of this clause in the charter has no meaning unless it be to make such insurance as would profit the charterers, which could only be effected by insurance against losses which would fall upon them, against all risks attaching to them. This insurance clause must have been intended for their protection, and could have been understood by them in no other way, and the agreement of the owners was not to partially but wholly to protect them, and to relieve them of the expense of insuring themselves. In effect it said to the charterers,—Your only responsibility will be to pay the hire of the ship; all other things shall be our care and at our charge. If, having so agreed, they chose to take the hazard of loss and to save the cost of a policy, they made themselves insurers, and after the loss cannot throw it upon the charterers.

The decree of the district court is affirmed with interest, and the costs of this court are adjudged to The Boston Fruit Company, appellee.

105 United States Circuit Court of Appeals for the First Circuit, October Term, 1898.

THE BARNSTABLE. No. 249.

Final Decree.

May 11, 1899.

This case came on to be heard at the October term of this court, A. D. 1898, on the transcript of the record of the district court of the United States for the district of Massachusetts and was argued by counsel.

On consideration whereof it is now, to wit, May 11, 1899, here ordered, adjudged, and decreed as follows: The decree of the district court is affirmed with interest, and the costs of this court are adjudged to The Boston Fruit Company, appellee.

By the court:

JOHN G. STETSON, *Clerk.*

106 United States Circuit Court of Appeals for the First Circuit, October Term, 1898.

THE BARNSTABLE. No. 249.

Clerk's Certificate.

I, John G. Stetson, clerk of the United States circuit court of appeals for the first circuit, certify that the printed pages numbered 1 to 102, hereto prefixed, contain and are a true copy of a transcript of record of the district court of the United States for the district of Massachusetts, the same being the entire record (except a bundle of charter-parties, being Exhibits 1 to 19, inclusive, referred to in the stipulation on page 102), upon which the cause entitled No. 249, The Barnstable, was lately heard and determined in said circuit court of appeals.

I further certify that printed pages numbered 103 to 104, hereto prefixed, contain and are a true copy of the opinion of said circuit court of appeals, in accordance with which the final decree of said court was entered on May 11, 1899.

I further certify that page numbered 105, hereto prefixed, contains and is a true copy of the final decree of said circuit court of appeals entered on May 11, 1899.

I further certify that printed pages numbered 1 to 105, inclusive, hereto prefixed, contain and are a true copy of the record and all proceedings in said cause to and including July 15, 1899, excepting that said record does not contain the bundle of charter-parties, Exhibits 1 to 19, inclusive, hereinbefore referred to, which exhibits are on file and of record in said circuit court of appeals.

In testimony whereof I hereunto set my hand and affix the seal of said United States circuit court of appeals for the first circuit, at Boston, in said first circuit, this fifteenth day of July, A. D. 1899.

[Seal United States Circuit Court of Appeals, First Circuit.]

JOHN G. STETSON, *Clerk.*

106½ [Endorsed:] File No., 17,598. U. S. C. C. of appeals, 1st circuit. Term No., 484. Turret Steamshipping Company, Limited, claimant of the steamship Barnstable, petitioner, *vs.* A. G. Hall *et al.* Filed January 3, 1900.

107 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the first circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Turret Steamshipping Company, Limited, claimant of the steamship "Barnstable," is appellant and A. G. Hall *et al.* are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the district court of the United States for the district of Massachusetts, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby
108 command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 17th day of January, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Return on Writ of Certiorari.

United States Circuit Court of Appeals for the First Circuit.

And now here the judges of the United States circuit court of appeals for the first circuit make return of this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States, wherein this writ of certiorari issued, "that the transcript of record heretofore certified to the Supreme Court by the clerk of this court and filed in the office of the clerk of the Supreme Court of the United States with the application for a writ of certiorari herein may be taken as the return to the writ issued by said Supreme Court to said circuit court of appeals under date of the 17th of January, 1900, and that this stipulation may be certified to the Supreme Court by the clerk of this court as and for the return to the said writ," and said stipulation is hereby certified accordingly.

In testimony whereof I, John G. Stetson, clerk of said United States circuit court of appeals for the first circuit, hereto set my hand and affix the seal of said court, at Boston, in said first circuit, this twenty-seventh day of January, 1900.

Seal United States Circuit Court of Appeals, First Circuit.

JOHN G. STETSON, *Clerk.*

109 United States Circuit Court of Appeals for the First Circuit.

TURRETT STEAMSHIPPING COMPANY, LIMITED, Claimant of the Steamship Barnstable, Appellant,
against
A. G. HALL ET AL., Appellees,
and against
BOSTON FRUIT COMPANY, Appellee.

It is hereby stipulated and agreed that the transcript of record heretofore certified to the Supreme Court by the clerk of this court and filed in the office of the clerk of the Supreme Court of the United States with the application for a writ of certiorari herein may be taken as the return to the writ issued by said Supreme Court to said circuit court of appeals under date of the 17th of January, 1900, and that this stipulation may be certified to the Supreme Court by the clerk of this court as and for the return to the said writ.

Dated Boston, January 27, 1900.

CARVER & BLODGETT,
Proctors for A. G. Hall et al.
RUSSELL & RUSSELL,
Proctors for Boston Fruit Co.
CONVERS & KIRLIN,
Proctors for the Turrett Steamshipping Company, Limited.

110 [Endorsed:] Supreme Court of the United States, October term, 1899. No. 484. Turret Steamshipping Co., Limited, *vs.* A. G. Hall *et al.* Writ of certiorari and return of the U. S. circuit court of appeals for the first circuit thereon.

111 [Endorsed:] File No., 17,598. Supreme Court U. S., October term, 1899. Term No., 484. Turret Steamshipping Company (Limited), &c., petitioner, *vs.* A. G. Hall *et al.* Writ of certiorari and return. Filed Jan'y 29, 1900.

Office Supreme Court U. S.
FILED
JAN 8 1900
JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States,

OCTOBER TERM, 1899.

TURRET STEAM SHIPPING COMPANY, LIMITED, Claimant of the Steamship *Barnstable*,

Appellant-Petitioner,

AGAINST

A. G. HALL *et al.*, Owners of the late Schooner *Fortuna*, Libelants; ARTHUR W. NUNAN, Petitioner; HAROLD EMERNAN *et al.*, Administrator, &c., Petitioners; ISAAC B. STEWART, Administrator, Petitioner,

Appellees,

and

AGAINST

THE BOSTON FRUIT COMPANY, Charterer of the Steamship *Barnstable*, Respondent,

Appellee.

MOTION.

Please take notice that the annexed petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the First Circuit will be presented to the Supreme Court of the United States on January 8, 1900.

New York, December 29, 1899.

Yours, &c.,

CONVERS & KIRLIN,
Proctors for the Turret Steam Shipping Company, Petitioner.

To Messrs. CARVER & BLODGETT,
Proctors for Libelants; and
Messrs. RUSSELL & RUSSELL,
Proctors for the Boston Fruit Company,
Respondent.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1899.

TURRETT STEAM SHIPPING COMPANY, LIMITED, Claimant of the Steamship *Barnstable*,

Appellant-Petitioner,

AGAINST

A. G. HALL *et al*, Owners of the late Schooner *Fortuna*, libelants; ARTHUR W. NUNAN, Petitioner; HAROLD EMERNAN *et al.*, Administrators, &c., Petitioners; ISAAC B. STEWART, Administrator, Petitioner,

Appellees,

and

AGAINST

THE BOSTON FRUIT COMPANY, Charterer of the Steamship *Barnstable*, Respondent,

Appellee.

PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of the Turrett Steam Shipping Company, Limited, owner and claimant of the steamship *Barnstable*, respectfully shows unto the Court as follows:

I.—These proceedings were begun by the libel of A. G. Hall and others against the petitioner's steamship *Barnstable*,

filed in the District Court of Massachusetts, January 15, 1896, to recover damages for the loss of the schooner *Fortuna* in a collision with the steamship *Barnstable*, which occurred off Highland Light on the 13th of January, 1896.

Intervening petitions to be made co-libelants were filed by Arthur W. Nunan, for himself, and by Harold Emernan *et al.*, and Isaac Stewart, as administrators of certain persons who were drowned in the collision.

II.—Before the time to answer expired, the Turret Steam Shipping Company, Limited, owner of the *Barnstable*, and claimant in the above mentioned proceedings, presented a petition to the Court stating that certain libels had been filed against the *Barnstable* in consequence of the said collision, and that it had been compelled to furnish a stipulation for value in the sum of $24,800, and a stipulation for costs in the sum of $200, and showing to the Court that its steamer *Barnstable* was let out at the time of the collision under a charter of demise, pursuant to which the charterer, the Boston Fruit Company, supplied its own officers and crew, who were navigating the vessel at the time of the collision, without the intervention of any pilot, and alleging that the faults of those in charge of the *Barnstable*, if any there were, which contributed to the collision, were in legal effect the faults of the said charterer, the Boston Fruit Company, and not of the said petitioner, the owner of the steamship.

The petitioner, accordingly, asked for process to bring the Boston Fruit Company into the case as a party respondent under the Fifty-ninth Admiralty Rule, or in analogy with it, and prayed that if fault should be found on the part of those in charge of the *Barnstable*, the said Boston Fruit Company, as between it and the shipowner, should be condemned to pay the damages (*Rec.*, pp. 9, 13).

A copy of the charter-party referred to was annexed to the petition (*Rec.*, pp. 14, 18).

Thereupon, on April 8, 1896, by order of the Judge, a summons was issued to the Boston Fruit Company to appear before

the District Court, on a day stated, to answer the foregoing petition (*Record*, p. 18).

On the 6th of November, 1896, the Boston Fruit Company appeared and filed its answer admitting that it was the charterer of the vessel, and that the charter-party annexed to the petition was a copy of the contract, but denied that it was liable for the acts of negligence, if any, of the master, officers, engineers or crew of the steamship, and alleged that, under the charter-party, the said Boston Fruit Company did not assume liability, or become liable for damage done by collision by the said steamship, which alone, it averred, was liable therefor, in a proceeding *in rem* (*Record*, pp. 25, 26 and 27).

The Boston Fruit Company did not answer the libel of A. G. Hall and others, but did answer the petition of Harold Emernan *et al.*, in which the Boston Fruit Company was joined as a party respondent (*Record*, pp. 18, 19).

III.—By the answers of the Turret Steam Shipping Company to all of the libels, and by the answer of the Boston Fruit Company to the petition of Harold Emernan, issue was raised as to the fault of those in charge of the *Barnstable* in connection with the collision.

Subsequently, however, after the taking of certain testimony in the case, the counsel for the *Barnstable* and the counsel for the Boston Fruit Company both became satisfied that those engaged in the navigation of the steamer were solely to blame for the collision. They accordingly on May 6, 1897, entered into a stipulation regarding the facts, which was duly filed in the cause and a copy of which is as follows:

"In the above entitled cause it is stipulated and agreed by and between the Turret Steam Shipping Company (Limited), claimant and owner of the steamship *Barnstable*, and the Boston Fruit Company, charterers, as follows:

"FIRST.—The collision alleged in the pleadings in the above entitled cause, was caused by the fault and neglect of those in charge of the navigation of the steamship *Barnstable* at the time, and was not caused or contributed to by the engineer of said steamship, nor by those in charge of the navigation of the libelants' schooner *Fortuna;* but this admission is made with-

out prejudice to and without intent to waive any of the contentions of either of the parties hereto, regarding the liability of either as against the other, as set forth in the petition of said Turret Steam Shipping Company (Limited), and the answer of said Boston Fruit Company thereto.

"SECOND.—The master, officers, engineers, firemen and crew of the *Barnstable* at the time of the collision, had been appointed by the Boston Fruit Company, and were paid by it under and pursuant to the charter-party referred to in said petition.

"THIRD.—The said steamship *Barnstable* had been engaged under the charter-party, a copy of which is attached to the said petition, for more than six months before said collision.

"FOURTH.—No complaint was ever made by either party under clause eleven of said charter-party.

"FIFTH.—There was no compulsory pilot on board said steamship at the time of the collision.

"SIXTH.—The collision was caused by the negligence of master, mates or crew at the time in charge of the navigation of the steamship.

"SEVENTH.—The master, mate, engineers, firemen and crew appointed as provided in said charter-party, were the only persons at the time in charge of the navigation of the said steamship, and responsible therefor.

"EIGHTH.—It is further agreed (subject to objection that the fact is immaterial, and the evidence incompetent), that the Boston Fruit Company had no insurance upon said steamship, and the petitioner, the then owner, carried a line of insurance on the vessel against sea perils, including collisions, but not for the full value of the vessel, the owner being in part uninsured" (*Rec.*, p. 37).

IV.—The cause thereupon proceeded to trial in the District Court upon the admission that the libelants were entitled to recover their damages (which it was agreed by stipulation amounted to the sum of $19,475, as of the date of January 1, 1897) [*Record*, pp. 35 and 36], the only real question remaining in issue being whether the Turret Steam Shipping Company, owner of the *Barnstable*, was entitled to indemnity from the Boston Fruit Company, the charterer, for the damages by reason of their having been caused by the charterer's servants.

V.—The Turret Steam Shipping Company admitted that under the maritime law, the *Barnstable* having been sued *in rem* for damages caused by the collision, was liable as between it and the libelants, notwithstanding that the faults, which rendered her so liable, were those of the persons employed and paid by the Boston Fruit Company, the charterer, who were in the possession and control of the vessel, and were solely engaged in her navigation; but it contended that as the charterer's servants, by their negligence, brought about the result which fixed the liability *in rem* upon the steamship, the decree should contain a provision that as between the Turret Steam Shipping Company and the Boston Fruit Company, the charterers should pay the damages decreed, or if it did not do so, that the Turret Steam Shipping Company should have judgment against the charterer for the amount it might have to pay to the different libelants.

The form of the proposed decree, as suggested by this petitioner, is quoted in the opinion of the District Judge (*Record*, p. 91). This was in accordance with the practice adopted in numerous cases in the District Court (*The Centurion*, 57 Fed. Rep., 412, 415; *Salisbury* vs. 70,000 *feet of lumber*, 68 Fed. Rep., 916; *Young* vs. *Lehman*, 27 Fed. Rep., 383, 385; *The Alert*, 40 Fed. Rep., 836; *Pierce* vs. *Winsor*, 2 Sprague, 35; *In re New York and Porto Rico Steamship Co.*, 155 U. S., 523.

VI.—The grounds on which the Turret Steam Shipping Company contended that the charterer was liable as between it and the vessel for the collision, were that by the charter-party, the bare ship was chartered to the Boston Fruit Company, which engaged, furnished and paid the officers, engineers and all the crew who were on board the vessel at the time of the collision (*Charter-Party*, p. 14, *Clauses* 2 & 3; *Stipulation between the parties*, *Sections* 2, 5, 6 & 7; *Record*, p. 37).

The charterer contended (though it did not so plead) that notwithstanding it employed and paid all of the persons who were engaged in the navigation of the ship at the time of, and who were to blame for the collision, it was nevertheless exempt

from liability for the faults of such servants by reason of clause 22 of the charter-party, which provides "That the owners shall pay for the insurance on the vessel" (*Record*, p. 16).

VII.—The District Court held that the shipowner, the Turret Steam Shipping Company, satisfactorily sustained its contention that the charter-party vested the possession, command and control of the vessel in the Boston Fruit Company and its servants, and that the navigation of the vessel was the charterer's business, and then proceeded to determine whether the relations between the owner and the charterer were such as to impose upon the charterer the obligation to indemnify the owner in case the vessel, as the instrument of damage, should be subjected to a lien through the negligence of those appointed by the charterer to manage her navigation (*Opinion*, p. 91). The District Judge, however, held that under the 22d clause of the charter, which provided "that the owners shall pay for the insurance on the vessel," the Turret Steam Shipping Company assumed the risk, not only of damage to the vessel herself by collision or otherwise, but also undertook to be responsible for damages which the vessel might do *to another ship*, including claims for personal injuries to and loss of life of persons on such other vessel (*Opinion*, pp. 93, 98).

VIII.—The petitioner, the Turret Steam Shipping Company, duly appealed to the Court of Appeals for the First Circuit, where the decision of the District Judge was affirmed in a short opinion delivered by Webb, *J.*, adopting in terms the opinion of the Court below as to the general features of the case and dealing with the single point of the effect of the insurance clause in the charter-party. The Court of Appeals held that by this clause, the ship owners undertook to "insure against losses which would fall upon them, against *all risks* attaching to them," and that if they had not insured against running down risks, and by accident insurances to cover losses caused by the charterer's negli-

gence, it was their misfortune, while if they had done so, the charterers should have the benefit of such insurance (*Record*, p. 104). The final decree was entered pursuant to this opinion (*Record*, p. 105), but the mandate has been stayed pending the presentation and determination of this application for a writ of *certiorari*.

IX.—The petitioner urges that both of the Courts below have erred in the construction they have put upon clause 22 of the charter-party, which provided: "That the owners shall pay for the insurance on the vessel."

It has been decided that this clause amounted to an assumption on the part of the owners of all liability for damage, not only to the vessel herself, during her service under the charter-party, but also for damage which she might do to another vessel, or to the lives, persons or property on board such other vessel, even when caused by the negligence of the charterer's servants. Such a meaning is far wider and more far reaching than the necessary meaning of the words themselves, and, as the petitioner believes, more extensive than is justified by their proper construction.

The case presented is simply who shall pay for a loss to another ship and to third persons on board of it, caused exclusively by the admitted negligence of the charterers' servants? These losses, by a principle of the maritime law, attach as a lien to the offending ship, without regard to the question of whose servants were on board. But as between the owner and the charterer, the owner under ordinary rules would be entitled to indemnity from the charterer for any damage which attached to the ship. If a hired vessel be lost by the fault of the bailee, he must, as a rule, pay for it (*Smith* vs. *Bouker*, 40 Fed. Rep., 839; 49 Fed. Rep., 954; *Davey* vs. *Chamberlain*, 4 Esp., 229). This rule would also undoubtedly require him to pay for damage to the ship, received in a collision due to the fault of his servants, and if the fault of these servants instead of injuring the hired vessel gives rise to a lien upon her for damage to another vessel, the bailee must logically be bound to discharge the lien; for the rule which re-

quires him to return the vessel undamaged must also, it would seem, compel him to return it without any impairment to or lien upon the title. The law implies a contract for such indemnity, though none be expressed (*The Alert*, 40 Fed., 836; *The Centurion*, 57 Fed., 412).

In these circumstances the burden of proof was clearly upon the charterer to satisfy the Court that the insurance clause quoted intended to remove all those ordinary incidents and liabilities of the contract of bailment from the shoulders of the bailee, and place them as a burden upon the bailor. Was this burden of proof satisfactorily sustained?

X.—The petitioner's contentions are:

First, that the insurance clause was not intended to require the owner to *provide* insurance, or to take the risk of damage which might be covered by it, but was designed merely to prevent the shipowner from claiming that the *cost* of insurance should be paid by the charterer under the third clause of the charter-party, which provided that the charterer should pay not only certain stated expenses in connection with the ship and her business, but also "*all other charges whatsoever* excepting for painting and repairs to hull and machinery and anything appertaining to keeping the ship in proper working order."

Second, that, at the utmost, the clause could only require the shipowner to provide an insurance *on the vessel* (*Barnstable*) and would not compel him to insure against such damages as arose in the present case.

Third, that the Courts below have fallen into the error of following the Massachusetts doctrine holding that a policy "*on the vessel*" covers damages which the vessel insured may do to another vessel (*Nelson* vs. *Suffolk Ins. Co.*, 3 Cushing, 477), instead of the rule prevailing in this Court under which such a policy does not include running-down risks, that is, damage which the insured ship may do to other vessels or property (*Insurance Co.* vs. *Sherwood*, 14 How., 351).

It is proposed to invite the attention of the Court in some detail to the leading considerations upon these points, and as the case was affirmed in the Court of Appeals practically on the opinion of the District Judge, reference must be made to his opinion. The attention of the Court is also called to the fact that a large bundle of printed forms of charter-parties, marked Petitioner's Exhibits 1 to 19 inclusive, are certified to the Court separately by the Clerk of the Court of Appeals, and are not included in the printed book.

(**1**.) The history and purpose of the clause relating to insurance.

(**a**.) This clause was not especially introduced into the charter-party of this steamer for the purpose of embodying any previous agreement on the subject of insurance, but, on the contrary, was a part of the printed form upon which the contract was made, which had existed in a different sequence in another kind of time charter for many years (*Bennett*, p. 62, x-Q. 214).

The printed form in use by W. W. Hurlbut & Co., the brokers who negotiated the charter, had been drawn up by the witness Hall, a member of that firm, about 1886 or 1887, and had been used by them ever since. It was based upon a copy of the time-charter form of Lamport & Holt (who for many years operated a line of chartered steamers between New York and ports in South America), and also upon the charters of the steamships *Scythian*, *Pirate* and *Kenelworth*, whose business was apparently in the hands of Hurlbut & Co., but whose charters had evidently been made abroad (*Hall*, p. 78).

The common form of time charter is what is commonly called the government or admiralty form, in which the owner mans and provisions the ship during the period of the charter.

It is evident from a comparison of Hurlbut's form (p. 14) with the government form of time charter (*Petitioner's Exhibit* 1 *in the bundle of charter-parties*), and with all the common forms based upon it (*Petitioner's Exhibits* 2 *to* 20), that Mr. Hall carried into his *net* form many of the provisions of the standard government form which were better adapted to that form than to his own. The insurance clause was one that he took in the same words from the government form, but for some reason not explained, put in a different sequence (*Barber*, p. 83). The shipowner produced to the Court all the standard forms of charter-

party that its counsel could find in New York, and three prominent English forms, all of which with a single exception contain the insurance clause in the same form as in the *Barnstable's* charter. It is in the same words in the government form, where the owner provides the crew, as in the net form, where the charterer provides it. Presumably, therefore, it is introduced for the same purpose in both. That purpose has been explained by a number of competent witnesses, who are practically uncontradicted.

Those acquainted with the business of operating vessels, know that certain usual charges will have to be borne by one or both of the parties to a contract for the hire of a ship under a time charter. Hence, there are found in all such contracts an enumeration of the expected charges to be borne by each, and a general clause providing that one of the parties shall pay all further charges not specified to be paid by the other. The more common form of this division of expenses is as follows:

"(1.) That the owners shall provide and pay for all the provisions and wages of the captain, officers, engineers, firemen, and crew; *shall pay for the insurance on the vessel;* also for all engine room stores, and maintain her in a thoroughly efficient state in hull and machinery for the service.

"(2.) That the charterers shall provide and pay for all the coals, fuel, water for boilers, port charges, pilotages, light and dock dues, dunnage, stevedoring, agencies, commissions, foreign consulages, expenses on the cargo they may put on board, and *all other charges whatsoever*, except those before stated" (*vide Petitioner's Charter Exhibits* 1 *to* 19).

In the charter-party in suit these provisions read:

"2. The charterers shall provide and pay for all oils and stores for the vessel, gear, tackle and appliances for loading and discharging the cargo, and for all the provisions and wages of the captain, officers, engineers, firemen and crew, who, excepting the guarantee engineer, shall be appointed by them. The owners shall appoint chief engineer for six months only; his pay not to exceed that paid by the charterers in similar vessels.

"The owners shall maintain the vessel in a thoroughly efficient state in hull and machinery for the service, including winches, with chain gear, and donkey boiler.

"22. That the owners shall pay for the insurance on the vessel.

"3. The charterers shall also provide and pay for all the coals and fuel, port charges, pilotages, agencies, commissions and *all other charges whatsoever*, excepting for painting and repairs to hull and machinery and anything appertaining to keeping the

ship in proper working order. Such repairs, as far as possible and is usual in such cases, to be done on board by the steamer's staff" (*Rec.*, pp. 14–17).

Moving clause 22 back to its original sequence, the provisions in this charter would follow, substantially, the common scheme of dividing the charges between the charterer and owner, and provide that the charterer "shall pay all other charges whatsoever," &c. It is fair to assume, therefore, that the clause was introduced for the same purpose in both kinds of charters.

The evidence of the witnesses leaves little doubt as to what that purpose was. It is shown that insurance on hulls, in some amount, is a general custom (pp. 69,79); and, of course, there is a charge for it. If it was not provided that such charge should be borne by the owner, the charterer might be called upon to pay it, under the broad stipulation that he is to pay "*all other charges whatsoever*," except those stated to be paid by the owner. This is the explanation of the origin of the clause furnished by a number of very competent and experienced witnesses.

Herbert Barber, a witness of thirty-five years' experience, produced his own form of charter-party (Petitioners Exhibit 7) and he testified as follows:

"Q. 4 (Witness is shown charter-parties, Petitioner's Ex. 7). Is that your form of time charter? A. That is one of our forms of time charter; yes.

Q. 5. I notice in the clause number 1 in that form, a provision that the owners shall pay for the insurance of the vessel.

Q. 6. Is that the usual form that is in all time charters? A. That is the usual clause.

Q. 7. And the form of it? A. Yes.

Q. 8. Do you know Hurlbut & Co.? A. I used to know them.

Q. 9. Look at clause 22 in their form and say whether that is the same clause and in the same form? A. It is the same clause, but not in the same sequence.

Q. 10. Not in the same sequence? A. No.

Q. 11. But the same in words, is it not? A. Yes, same exact words.

Q. 12. How does that clause come to be in time charters? A. You know in most time charters there is a clause about what each shall pay for. The owner shall pay for the provisions, wages, fees of the captain, officers and crew; and then the next clause is the charterer shall provide and pay for all the coals,

port charges, pilotages, commissions, consulate fees, except those pertaining to the captain, officers and crew, *and all other charges whatsoever;* and for that reason, under clause 1, they provide that the insurance of the vessel is to be paid by the owners.

Q. 13. That being a usual charge on all vessels? A. Insurance is a usual charge; yes " (pp. 83, 84).

Ramon G. Cadiz, a witness of twenty-one years' experience, who has charge of the time-chartering department of Funch, Edye & Co. (who the witness Bennett testified were his principal competitors), produced the government form of time charter in use by his firm (p. 75; *Petitioner's Exhibit Charter Party No.* 19). He testified:

"Q. 6. (Paper shown witness.) Is this a copy of the time charter of your firm? A. Yes. That is our regular government form of time charter. (*Paper put in and marked Barnstable Ex.* 19).

Q. 7. I notice in that charter-party a provision in the first numbered paragraph reading, 'The owner shall pay for the insurance of the vessel.' Is that a usual clause in all time charters? A. Yes.

Q. 8. How does that clause come to be there? A. It is one of the clauses introduced for the purpose of establishing that the owner must pay the insurance on the vessel.

Q. 9. What is the occasion for enumerating that as a charge against the owner? A. Well, if it was not there, the charterer might, under paragraph No. 2 be called upon to pay the insurance on the vessel, on the strength of the clause stating that all other charges whatsoever except those before stated are to be for account of the charterers" (p. 76).

Bennett, a witness for the charterer, at one place in his testimony, admits that this was the real purpose of the clause.

"The intention is clearly that if the *owner* insures the vessel *he must pay for* the insurance, not the charterer" (p. 48).

The fact that we find the insurance clause in identical form in the types of time charter, where the shipowner furnishes the crew, materially weakens the arguments upon which the District Judge reached his conclusion as to its import in the *Barnstable's* charter, where the crew was supplied by the charterer. He argued that the risk of a collision through the negligence of the charterer's servants, resulting in damage to a third vessel, would probably be in the contemplation of the parties at the execution of the charter; that they would be likely,

therefore, to contract with reference to it; and that presumptively the insurance provision as contained in clause 22 was designed to cover such a case. But, in the government form of time charter, the *owner's* servants being in command and possession of the ship, the charterer would have no interest in having the owner insure the ship, as any loss or damage which might be caused or occasioned either to the ship herself, or to another, could only be through the fault of the shipowner's servants, and so could not possibly give rise to any claim for indemnity from the charterer. We know, therefore, that in the government form the introduction of the clause must be for some other purpose than that suggested by the District Judge in this case. What other can be suggested, however, except that furnished by the witnesses, that the charge for insurance is specified to be paid by the shipowner in order to prevent a claim that it should be paid by the charterer, under his general undertaking to pay all non-enumerated charges? As the clause was obviously imported into Hurlbut's form from the government form, it is difficult to argue that it has a meaning here which it could not possibly have have had in the form from which it was taken.

(**b**.) The District Judge erred in finding that it was "proved by the charterer, and is not disputed, that the actual *understanding of the owner* at the execution of the contract was that the phrase included insurance against risks of all kinds" (p. 96).

This finding is stated to have been predicated on the testimony of Bennett, the broker who negotiated the charter.

He testified: "I have had a good deal of experience in various insurance claims, so much so that I claim—* * * so much so that I clearly expressed to the owner that he would have to pay for all insurance on the vessel in any way, shape and manner, against stranding, collisions and everything, as is usually done in all vessels, unless he wanted to take the risk and not insure" (pp. 96, 44).

This voluntary statement of the witness was not responsive to any question addressed to him (p. 44), and was received by the Court over the objection to all testimony as to conversations prior to the signature of the charter "as immaterial, irrelevant and incompetent, and inadmissible to explain

the writing" (p. 40). These objections were duly taken at the trial, and were noticed by the Court in the opinion (p. 96).

It is to be observed that Bennett does not state anything that the *owner said to him*, upon which a finding can be fairly made as to "the actual understanding of the *owner*," but, on the contrary, merely expressed *his* opinion *to* the owner of the import of the clause. It is not asserted that the owner coincided in this view; so that the evidence, if admissible, really does not prove any understanding except Bennett's.

Bennett's first statement of the conversation is worthy of notice (p. 42):

"Q. Did you have any conversation with Mr. Craggs (the "prior owner) in regard to that clause? A. I did—several.

"Q. Please state the substance of that conversation? (Objection.)

"A. I told him that he would have to insure for his vessel "*the same as the charter-party stated*" (p. 42).

It is apparent from this that the witness did not remember precisely what he had said to Mr. Craggs.

But, whether his statement was of the tenor first stated or of that afterwards testified to, it is inconclusive, (1) because it made no reference to insuring against damage which might be done to other ships; (2) because it does not assume to say that Mr. Craggs coincided in Bennett's view, and therefore did not bind him to any agreement *dehors* the contract, and (3) because it was inadmissible as against the Turret Steam Shipping Company, the purchaser of the vessel and charter-party, who was not proved to have had any notice of the conversation, and therefore, in taking over the charter, was only bound by the obligation imported by the words of the clause in their ordinary sense, or in the sense of some settled trade meaning (*Paige* v. *Cagwin*, 7 Hill, 361; *Bristol* v. *Dame*, 12 Wend., 142; *Clews* v. *Kerr*, 90 N. Y., 633; *Truax* v. *Slater*, 86 N. Y., 630; *Taylor* v. *Van Tassel*, 86 N. Y., 642).

The fact of the transfer of the ownership of the vessels and of the charter-parties from Messrs. Craggs to the Turret Steam Shipping Company, and the attornment of the Boston Fruit Company to the vendee, are admitted in the respondent's answer to the petition (p. 26).

(c.) No real light is thrown on the purpose of the insurance clause by Clause 17, to which the District Judge alluded.

This, like the insurance clause, was adopted into Hurlbut's form many years ago from the Government form (see Charter Exhibits), under which the owner's servants are in charge of the navigation. In such case, if the vessel lost time from a collision or a stranding, it would be but fair that the hire should be deducted, as the cause of the loss presumptively would be due to faults imputable to the owner.

In a net form like the present, where the *charterers'* servants would be presumptively responsible for the collision, it is anomalous to provide that the loss of time from such cause should be borne by the blameless shipowner. Such a provision in the contract can only be accounted for, reasonably, by the use of a printed form not strictly apt in this particular, in making up the contract. If the parties had drawn it up in writing, or had it drawn up by counsel, it is most improbable that such a provision would have been embodied.

However this may be, the presence of the clause does not help the District Judge's argument, because a loss of hire due to a collision would not be a loss insurable under a policy "on the vessel," even with a running-down clause attached. It could only be covered by a policy *on freight*. The fact, therefore, that under the printed form, the owner was made to assume the risk of loss of time by collision, which could only be covered by a *freight* policy, throws no light on the question whether Clause 22 required him to insure against running down risks for the charterer's benefit.

As both Clause 17 and Clause 22 were imported into this printed form from another kind of charter, neither helps much in the interpretation of the other under the different conditions of a net form of contract.

(**2**.) The "insurance *on the vessel*," for which the owner was to pay, unless extended by a general trade meaning based upon a practical construction by merchants and underwriters, would not include insurance against running-down risks, but only insurance against damage to the vessel insured.

(**a**.) The phrase "insurance *on the vessel*" is a technical expression found in all policies on ships, and has been construed by the Courts.

The ancient form of insurance by Lloyds' policy on a ship was in almost identical words: "Be it known that A. B. * * *

"doth make assurance and cause himself * * * to be "insured * * * *upon the body*, tackle, apparel, ordnance, "munition, artillery, boat and other furniture *of and in the* "*good ship or vessel* called the * * *" (*Gow, Marine Insurance, p.* 29; *Gourlie, p.* 69; *Petitioner's Exhibits* 17, 18). Those exhibits show that at the present day hull insurance is made "*on the vessel.*"

In *General Mutual Insurance Company* v. *Sherwood*, 14 Howard, 351, an effort was made to recover under a policy issued "*upon the brig Emily*" (p. 361), a loss of $8,000 which her owner had been compelled to pay for damage done by the *Emily* to another vessel. It was held that an insurance "upon the brig *Emily*" *did not cover damages which the brig might do to another vessel*, but only damage which came to the *Emily* herself.

The English law is to the same effect.

In "*Tyser on Marine Insurance Losses*" (London, 1894), the rule is stated as follows:

"§ 129.—The only effects of the perils insured against, for which the underwriter *on ship* is liable, are damage or loss of the ship, &c., insured. * * * A mere money loss, not arising from damage to the ship insured, *e. g.*, a payment to be made to another ship for injury done to it in a collision, is not a loss recoverable from the underwriter, in the absence of a collision clause (*De Vaux* v. *Salvador*, 4 Ad. & El., 420)."

In the present case, therefore, under those authorities, an insurance by the owner of the *Barnstable* "on the vessel" in the language of clause 22, would not have indemnified him against the damages adjudged to be paid in this cause to the *Fortuna* and her crew. Unless, therefore, it can be found from the evidence that since 1852, the date of the decision above referred to, "an insurance on the vessel" has come to mean something different and more extended than the import of those words as determined by the Supreme Court, the Court below clearly erred in holding that the owner's undertaking to pay for the insurance "on the vessel" absolved the charterer from his common law liability to discharge the lien on the *Barnstable* for damages to another vessel and her crew, which would not be covered by insurance on the *Barnstable*.

Upon this point both of the Courts below appear to have followed the Massachusetts rule under which an insurance "on

the vessel" covers damage not only to the vessel insured, but which that vessel causes to another by collision (*Nelson* v. *Suffolk Ins. Co.*, 3 *Cushing*, 477). Though the Courts sat in the State of Massachusetts, they were nevertheless Federal Courts, bound to follow the decision of this Court in *General Mutual Ins. Co.* v. *Sherwood*, *supra*, and erred in failing to do so.

(**b**.) The finding that the shipowner, by custom or inference, was compelled under clause 22 to pay for something more than that which would be included under an ordinary policy "on the vessel" is in conflict with clause 3 of the charter-party, which provides that "*the charterer shall* * * * *pay* * * * *all other charges whatsoever*," except those provided to be paid by the owner.

It was testified by an eminent expert, and not disputed, that the "running-down clause," as it is sometimes called, is not a part of an ordinary policy, either English or American (p. 73). It is generally on a printed slip or rider which is attached to the policy, although sometimes it is issued as a separate policy. So, if an owner wanted insurance, without a collision clause, he would get one policy; if he wanted a collision clause, he would get another, and if he wanted both, he would get two (p. 74). Pressed upon cross-examination as to the extra cost of a running-down clause, or a separate running-down policy, the witness testified that it would add a quarter or a fifth to the ordinary premium (p. 75).

Now under *Insurance Co.* vs. *Sherwood*, *supra*, it is clear that an insurance on the vessel would only afford indemnity for the damage to the vessel itself. The *cost* of that much insurance the owner undertook to pay. He did not expressly undertake to pay any more. His obligation to pay more cannot justly be founded upon any inference or custom, in view of the provision in clause 3, that all other charges whatsoever, except those specifically provided to be paid by the shipowner, must be paid by the charterer itself. The extra cost of a running-down clause is another *charge*. It is, therefore, a charge to be paid by the charterer, and to adopt the reasoning of the District Judge *pro tanto*, if it has not paid that charge, and thus reduced the risk to the cost of the premium, it assumed it itself and should be held to indemnify the owner against it.

(3.) The preponderance of the evidence is overwhelming to the effect (1) that the words "insurance on the vessel" have no trade meaning different or more extended than their ordinary sense, as judicially defined, and (2) that there has been no practical construction of the clause so far as known by merchants and underwriters, under which the charterers are entitled to the benefit of insurance taken out by the owner.

In *Insurance Company* v. *Sherwood*, 14 How., 351 (at p. 362), Mr. Justice Curtis said:

"In examining for the first time any question under a policy of insurance it is necessary to ascertain whether the contract has received *a practical construction by merchants and underwriters; not through any partial or local usages, but by the general consent of the mercantile world.* Such a practical construction, when clearly apparent, is of great weight, not only because the parties to the policy may be presumed to have contracted in reference to it, but because such a practice is very high evidence of the general convenience and substantial equity of it as a rule."

(a.) The evidence of Bennett was introduced by the charterer for the purpose of establishing such a practical construction, to the effect that clause 22 imposed an *obligation* on the owner to insure against running down risks.

His testimony, however, is extremely unsatisfactory. He first intimated that he had inserted the insurance clause in this particular charter-party as a special provision (p. 41); but, after being shown the printed forms of all the other leading ship brokers in New York, he finally admitted that no change had been made in it in adapting it into the form used by his firm (p. 62), which was shown by his partner, Hall, to have been drawn up and in use before Bennett joined the firm (pp. 78, 39). Asked by his counsel what was included in insurance "on the vessel," Bennett said: "Insurance *on the vessel* against stranding, collisions, &c., as usual" (p. 41); but does not intimate that it would include damage done *to another* vessel. He further says that he told a *former* owner of the *Barnstable* at the execution of the charter-party that "he would have to insure for his vessel *the same as the charter-party stated*" (p. 42). The same thing was repeated later in his testimony (x-Q. 64, p. 44), with a little more elaboration, but still without any suggestion that the owner would need to insure

against damages done to *another* vessel. He first claimed to have had experience in settling losses under these policies (p. 45), but they seem to have been cases where the vessel *insured* had been damaged, and he finally admitted that the question had never come before him, as a practical matter, until this case arose (x-Qs. 86, 87; pp. 46, 47).

Mr. Hall, who for many years and until after this accident was his partner, and had been a partner in the firm before Bennett joined it, also testified that the adjustment of liabilities between owners and charterers on net forms, such as this, had never come up for practical determination before the firm of W. W. Hurlbut & Co., during the time that he was with it (p. 78).

It is believed that Bennett's evidence is wholly insufficient to show such a practical construction of this insurance clause, "by merchants and underwriters and by the general consent of the mercantile world" as would be required to give it a more extended construction than that put upon it in *Ins. Co.* v. *Sherwood* (*supra*), and have it include an obligation by the owner to insure against running-down losses for the charterer's benefit.

But there is other evidence on the same subject showing that Bennett's opinion of the meaning of the clause is entirely individual, and not supported by any usuage or opinion of the general mercantile world.

Hall, a witness of twenty-five years' experience, testified (p. 78):

"Q. 16. Referring to clause 22, that the owners shall pay for the insurance on the vessel, has that clause any commercial or trade significance differing in any way from the ordinary meaning of the words? A. No.

Q. 18. Is there any commercial or trade understanding that the charterer is to have any benefit of such insurance? A. None at all."

Herbert Barber, a witness of thirty-five years' experience, testified (p. 84):

"Q. 14. Is there any trade meaning or interpretation of that clause differing in any way from the ordinary meaning of the words? A. Not that I am aware of.

Q. 16. In the form in which you have it [the insurance clause], "does the charterer by any common usage get any benefit of the owner's insurance? A. No, I don't think so. No.

Q. 20. And so far as your experience goes, there is no trade meaning or interpretation of the ordinary clause that the owner shall pay for the insurance of the vessel differing in any way from the plain meaning of the words? A. Not that I am aware of."

Ramon G. Cadiz, a witness of twenty years' experience, testified (p. 76):

"Q. 15. Is there any customary or trade meaning to those words, 'the owner shall pay for the insurance on the vessel,' which differs in any way from the ordinary meaning of the words? A. None whatever. Just the literal sense in which the expression is made use of there."

The evidence of Mr. Gourlie, to which the District Judge alluded, was far from showing any definite trade meaning of the phrase differing from its adjudged legal meaning. The material part of his testimony on the subject is short, and may for convenience be quoted (p. 70):

"x-Q. 21. So that when you speak of a policy of insurance on a vessel you would understand that to cover at least three-quarters of the running down? A. Well, no, answering that question. I don't think that I would. * * *

x-Q. 26. Where a charter-party provides that the owner shall pay for the insurance on the vessel, would not that, in your opinion, include all insurance? A. No."

Page 71: "x-Q. 30. Where the charter provides that the owner shall pay for the insurance on the vessel, would not that, in your opinion, include all insurance A. No.

x-Q. 31. What would not be included? A. I do not think that the four-quarters collision would be included in it.

x-Q. 32. That is, under that clause in the charter-party, in your opinion, the shipowner would insure against the loss of the vessel, and the charterer would insure against her running down? A. No; I didn't mean that, either.

x-Q. 33. Will you explain, then? A. Under that clause I should not expect that the owner of the vessel would insure against everything. For instance, I should not expect to find that he would insure against more than three-quarters collision.

x-Q. 34. You would expect him to insure to the extent of three-quarters? A. Yes; that is my *feeling* on the subject."

Page 74: "x-Q. 53. In the case of an English vessel, if I understand you, taking out insurance, you would expect that insurance to cover three-quarters of the running down? A. I would, if I was told that they were seeking full insurance.

x-Q. 54. Full insurance would imply, of course, insurance

against running down as well as insurance against other loss? A. Full insurance would imply insuring three-quarters running down as well as other loss.

x-Q. 55. Simple insurance would imply that? A. No. *It would prompt an inquiry*, I think. If you ask me to procure insurance on your hull, and you told me the amount and her name, and her tonnage, and her voyages, and her valuation and all that, *I would have to ask you the question, 'Do you want the running down included?'*"

On this state of the evidence it clearly cannot be said that the contract has received "a practical construction by merchants and underwriters, not through any partial or local usages, but by the general consent of the mercantile world," under which the phrase "insurance on the vessel" can be said to include anything more than it was held to include in the case of the *Insurance Company* vs. *Sherwood*, namely, insurance against damage to the *Barnstable* herself.

(**b**.) Insurance against running-down risks is not properly described as an insurance "*on the vessel.*" It is generally a "rider," though sometimes a separate policy, but, in either case, is not expressed as an insurance "on the vessel." Mr. Gourlie gave the substance of the form of it in his evidence (p. 72).

It is set out in full in *McArthur on Marine Insurance* (2d Ed.), p. 372, as follows:

"And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum or sums of money not exceeding the value of the ship hereby assured, we will severally pay the assured such proportion of *three-fourths* of the sum so paid as our respective subscriptions hereto bear to the value of the ship hereby assured; and in cases where the liability of the ship has been contested with our consent in writing, we will also pay a like proportion of three fourth parts of the costs thereby incurred, or paid; *provided* also, that *this clause shall in no case extend to any sum which the insured may become liable to pay, or shall pay, in respect of loss of life or personal injury* to individuals for any cause whatsoever."

This is no more properly to be described as an "insurance on the vessel" than would be an employer's liability policy, taken

out against liability for personal injuries to those on board the vessel, which it is seen, is expressly excluded from the indemnity provided by the running-down clause.

(c.) The Court should not have been astute to find a meaning in the insurance clause which would oblige the owner to insure against the misconduct or neglect of the servants of the charterer.

It was open to the charterer to insure against those risks. If it has not done so, we must assume it intended to bear them, unless it can point to some clear provision in the charter by which those risks were devolved upon the owner. The burden of proof to show a devolution of the risk must rest with the charterer. A finding that the risk had been shifted should not be made except upon very clear proof. The law regards with disfavor a stipulation that one party shall insure against another's misconduct and give that other the benefit of the insurance (The *Hadji*, 22 Blatchf., 235, 238).

(d.) The evidence did not warrant the conclusion reached by the Court that the charterer was entitled to the benefit of the shipowner's insurance.

It is to be borne in mind that both the shipowner and the charterer had insurable interests. The shipowner had his own investment at stake, which was liable to be lost by perils for which neither party to the contract would be liable, *e. g.*, perils of the sea. He might also wish to insure the solvency of the charterer, in case the latter by its faults imposed liens on the ship which it could not discharge. Because the law attaches a primary liability to the ship for a collision loss to another ship, the owner also had an insurable interest in that risk, which would not be affected by the fact that the charterer had an insurable interest in it. The owner's insurable interest in such risk would not be taken away by the fact that he had a right of indemnity against the charterer; for a charterer might prove to be insolvent. The mere fact, therefore, that the Turret Steamshipping Company "carried a line of insurance on the vessel against sea perils, including collisions, but not for the full value of the vessel, the owner being in part uninsured," as is stated in the stipulation (subject to the objections reserved, and which were renewed and pressed in both courts),

does not tend in any way to establish a practical construction by the parties of the meaning of clause 22. Much less does it tend to show a mutual intention that the charterer should have the benefit of the insurance effected by the shipowner. The Court nevertheless, went not only to the length of holding that the charterer should have the benefit of all of the shipowner's insurance, but penalised it in the sum for which it was uninsured, and also for the personal injury risks which were not insurable under an ordinary policy, even with a running-down clause attached (*Gourlie*, p. 72; Q. 40), but could only be insured under an accident policy.

The District Judge seems to have regarded the shipowner and the charterer as engaged in a joint enterprise. For example (p. 95). he says: "The phrase seems broad enough to include insurance of every kind that in the expectation of the parties properly appertained to their *joint enterprise*" (p. 94). "In reply to this criticism, it may be said that the owner's argument involves the fallacy of a shifting of premises and of treating the insurance, first, as relating to the vessel and *to the joint enterprise of owner and charterer*," &c.

The District Judge certainly misconstrued the petitioner's argument and brief, if he understood it was ever suggested that the parties were engaged in a joint enterprise. It was not so stated in the brief.

In point of fact there was nothing *joint* about the enterprise, any more than there would be a joint enterprise between landlord and tenant, under a lease which provided that the landlord should pay certain expenses in respect of the premises, and the tenant should pay others.

The enterprise of the shipowner was limited strictly to furnishing the ship and keeping it in order for use, and thus earning a monthly rent for its service. It was of no interest to him whether the charterer actually made any use of the vessel or not. The use of the vessel in its business of importing fruit was the enterprise of the charterer exclusively.

The assumption that the parties were engaged in a joint enterprise really lies at the base of much of the Judge's opinion. For example, he argues that because the charter-party specified certain charges to be borne by the charterer, and certain by the shipowner, that "it must follow that both should share in all benefits accuring from the payment of fixed charges upon the vessel" (p. 95).

Surely this cannot be law. If it is, then the shipowner ought to share in the profits which accrued from the importation of the charterer's fruit. He obtained no benefit from the mere navigation of the shlp, as the hire was payable whether the ship was navigated or not. He therefore gained no benefit from the payment by the charterer of the charges it assumed, all of which were incidental to the use of the ship as an instrument of commerce with which he had no concern, unless he is still entitled under the mutual benefit theory to some of the fruit profits.

It is impossible to spell out of the words used, any mutual intention that the charterer should have the benefit of the insurance obtained and paid for by the owner. There is nothing in the charter-party which implies it, and the evidence of the witnesses is conclusive to the effect that there is no custom under which the charterer should have it.

Hall testified:

(P. 78, Q. 18.) "Is there any commercial or trade understanding that the charterer is to have any benefit of such insurance? A. None at all.

(P. 79.) "Q. 26. Is there a well known clause in charter-parties to meet the case of an owner insuring for the benefit of a charterer if the charterer desires or requires it? A. I have seen such clauses.

"Q. 32. Have you chartered any vessels on different forms in which the insurance clause was different? I mean to ask you about the Pirate and the Kenilworth? A. Those are the only two boats that I remember.

"Q. 33. How about the insurance clause there, if you remember? A. The printing of it?

"Q. 34. No, the way it was. A. If I remember rightly, it specially stipulated that the boats were to be kept insured, and that any damage done to the vessel over one hundred and twenty pounds, which was not covered by the policy; but any damage over one hundred and twenty pounds recovered under the insurance policy, the charterers were to have the benefit of the insurance.

"Q. 35. And how about the one hundred and twenty pounds? A. If the damage did not amount to that, then the charterers had to pay for the damage."

The witness further testified (Q. 40) that he was acquainted with Mr. Strick of the firm of Frank C. Strick & Company, of London, Swansea, Cardiff and Newport, England, and had seen similar clauses to that embodied in their form (*Petitioner's*

Charter, Exibit 15). That clause quoted in the opinion of the Court (p. 96) reads:

"The owners * * * shall pay for insurance on the vessel *against all risks*, including protection and indemnity, and freight and demurrage club protection, *giving charterers full benefit of the same*, as if they were for the time being owners of the ship."

Herbert Barber (p. 84, Q. 16) also testified:

"In the form in which you have it (clause in his form of charter was in the same words as the clause here in question), does the charterer, by any common usage, get any benefit of the owner's insurance? A. No, I don't think so.

"Q. 17. Now, if the charterer desires the benefit of the owner's insurance, is there a provision for that made? A. In some charters it is made."

(P. 85.) x-Q-21. "That is, if I understand you, Mr. Barber, where the owner agrees to pay for the insurance he has the benefit of the insurance? A. That is so; yes.

"x-Q. 22. And if the charterer is to have any interest in that insurance it must be so provided expressly? A. That is my understanding of it; yes."

Bennett testified:

"I have never seen a charter pass through our office or any other office in which a charterer insured the vessel *or got any benefits from insuring the vessel whether made by the owners or anybody else*" (p. 48).

Notwithstanding this evidence, the District Judge found, as we understand it (p. 96), that clause 22 of this charter-party, which provides "that the owner shall pay for the insurance on the vessel," was as broad, included the same subjects, and gave the charterer the same benefits as the clause in Strick & Company's charter above quoted.

This finding, if we are right in taking it as such, seems to be indefensible. Clearly an insurance "on the vessel" is not the same thing as an insurance on the vessel against "*all risks* including protection and indemnity and freight and demurrage club protection." "Protection and Indemnity, Freight and Demurrage Club risks," for example, are not insurance in any proper sense.

In the *Titania*, 19 Fed., 101, where the bill of lading provided that the shipowner should "not be liable for any damage to goods capable of being covered by insurance," it was held (p.

104) that the clause "cannot reasonably be construed as intended to mean any possible insurance and upon any possible insurance. It must be held to refer only to insurance which might be obtained in the usual course of business from the ordinary insurance companies."

There is absolutely nothing in clause 22 which is equivalent of the express provisions in Strick's charter which gives "charterer's full benefit of same as if they were for the time being owners of the ship."

It is too great a stretch upon language to hold that it gave the charterer the same rights it would have had under the quoted clause in Strick's charter. The Court should have found that neither the words of the clause, nor the evidence in the case, implied that the Fruit Company should have the benefit of the owner's insurance.

If such a result was desired the charterer should have caused to be inserted the usual clause adopted to achieve it. Commou carriers often stipulate that in case of claims for damage they shall have the benefit of the shipper's insurance on goods; but in such cases the intention is made clear, as, for example: "The carriers [if] liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods" (*Phœnix Ins. Co.* v. *Erie, &c.*, 117 U. S., 312; The *Hadji*, 20 Fed., 875; 22 Blatch., 235; *Rintoul* v. *N. Y. Central Ry.*, 21 Blatchf., 439; The *Sidney*, 23 Fed., 88).

(**4.**) If the insurance by the owner of running-down risks be required by some extension of clause 22, by custom, nevertheless the usual insurance against them is only three-quarters of the risk, exclusive of personal injuries and death claims; so that, in any case, indemnity should have been decreed for the one-quarter collision uninsured and the whole of the death and injuries claims.

The one-quarter collision usually remaining uninsured would amount, in this case, to about $3,643.75, and the personal injuries claims, uninsurable, under an ordinary policy, to $4,900, on both of which interest runs from January 1, 1897, at six per cent. (pp. 35, 36). For these amounts indemnity should have been awarded even on the findings of the District Court.

(**a.**) The only evidence in the case as to the custom of insuring under the running-down clause, is that of Mr. Gourlie, whose

testimony is explicit that the customary insurance of that risk is only three-quarters (pp. 70, 71, 74, Q. 54).

He says that in the usual English form the words "three-quarters" are printed in, and that in the occasional case where four-quarters are insured the words "three-quarters" are erased with pen and ink. "They do not have any printed clause with those words omitted; showing that the usage is three-quarters rather than the whole" (p. 73). It will be seen that the form of this clause, as set out in *McArthur on Insurance* (2nd Ed., p. 372; quoted *ante* at p. 53), reads: "We will severally pay the assured such proportion of *three-fourths* of the sum so paid as our respective subscriptions hereto bear to the value of the ship hereby assured."

If, therefore, the Court below was influenced by any evidence as to the custom of insuring against running down, it should have limited the obligation imposed upon the owner, under it, to the three-quarters of the collision damage, which is the customary amount of such insurance; and indemnity should have been awarded for the other quarter and for the loss of life and personal injury claims.

The Court held, however, that evidence of custom to insure only three-fourths was not material as indicating the intention of the parties. This would clearly seem to be erroneous. The intention of the parties must be derived from their contract, taking the words either in their ordinary sense, or in some customary trade meaning evidenced by a practical construction given to them by the general mercantile world. The Court received Bennett's opinion that the clause called for insurance against collision; it should, therefore, have accepted the evidence of the *usual* limitation of the amount of such insurance,—a matter certainly not clearly specified in the clause.

(**b**.) Mr. Gourlie further testified that the running-down clause contains "a provision that this policy *does not include loss of life, or personal injuries*, or obligations to pay for the removal of wrecks, or statutory powers, and things of that sort" (p. 72, Q. 40).

The more formal wording of the clause, as stated by *McArthur* (p. 372) is: "Provided also that this clause shall in no case extend to any sum which the insured may become liable to pay, or shall pay, in respect of *loss of life*, or *personal injury* to individuals, for any cause whatsoever."

The Court below says the whole loss was insurable. No doubt the additional one-fourth collision would be insurable for an extra premium, but the evidence shows that *customarily it is not insured* (*Gourlie, p.* 73). There is no evidence in the case, however, that claims for personal injuries, received by persons on the vessel run down, are insurable under the usual or any other form of policy. The Court may, perhaps, take notice that such claims are only covered by Accident Insurance or in Mutual Protection and Indemnity Associations, where the shipowner himself, as a member, bears a part of the loss.

In the *Titania* (19 Fed., 101, 104), Brown, *J.*, held that an indemnity obtained by entering vessels in such associations did not constiute *insurance*, within a provision of a bill of lading that the shipowner should "not be liable for any damage to goods capable of being covered by insurance." Under that authority, it is clear that the ship would not have been bound to arrange for indemnity against personal injury claims, even under the extended construction of clause 22 adopted by the learned District Judge.

In conclusion, the errors complained of are: (1) in holding that the insurance clause imposed an *obligation* on the owner to *provide* insurance, the benefit of which should go to the charterer; (2) in holding that the owner was bound to *provide* insurance against *all* damage the vessel might cause to *other ships*, and persons or property on board of them; (3) in holding that the clause, even on the construction that it included running-down risks, meant to require more than the *customary* amount (¾ths) of such risks; and (4) in holding that it called for unusual insurances (*a*) against the fourth-quarter collision, and (*b*) against claims for loss of life and personal injury.

XI.—The petitioner avers that questions of gravity and importance are involved in the cause sufficient to justify the exercise of the jurisdiction vested in this Court to issue writs of *certiorari* requiring causes to be brought here for review from the Circuit Court of Appeals.

It is believed that the question whether the charterer of a demised vessel is bound to indemnify the shipowner against collision or other liens attaching to the vessel during the time of

the charter, has never been presented to this Court for its consideration. It arises here in a case involving a substantial sum, and under such circumstances that *if the Court refuses this application, the shipowner will be deprived of all right to ask such indemnity through a separate action.* All parties were before the District Court and the Court of Appeals, which had jurisdiction of them and of the subject matter of the litigation, and the decision reached, if not interfered with by this Court, will constitute a conclusive adjudication of the rights of this petitioner as against the Boston Fruit Company, and will be a bar to any further action between the parties on this point.

The petitioner, with all respect, urges this consideration very strenuously upon the attention of the Court.

No prejudice can result to any of the parties in interest by reason of the allowance of the writ, as it is provided by stipulation that interest runs on the damage at six per cent. (*Record, p.* 36), and it is understood that the libelants and intervening libelants make no objection to this application. No judgment has been entered against the Boston Fruit Company, so that it can suffer no prejudice except such as might arise from a reversal of the decree in this court, which is the direct object sought by this application.

XII.—Your petitioner presents herewith a certified copy of the transcript of record returned from the District Court to the United States Circuit Court of Appeals, and of the record in the last named Court.

Wherefore, your petitioner prays that this Honorable Court will cause the writ of *certiorari* to be issued pursuant to the power vested in this Court by the judiciary act approved March 3, 1891, requiring the said United States Circuit Court of Appeals for the First Circuit to certify the whole record and cause to this Court for consideration, and that thereupon this Court will decide the whole matter in controversy between the parties.

And your petitioner will ever pray, &c.,

TURRET STEAM SHIPPING COMPANY, LIMITED, *Petitioner,*
By CONVERS & KIRLIN, its Proctors.

STATE OF NEW YORK, }
County of New York, } ss.:

E. B. CONVERS, being duly sworn, makes oath: That he is one of the proctors for the petitioner herein; that he has read the foregoing petition, and that the same is true to the best of his knowledge, information and belief; that the reason why this petition is not verified by the petitioner is that the petitioner is a foreign corporation, organized and existing under English law, and has no officer or agent in this country; that this petition is made and presented by due authority, and that the application is meritorious, and is not made for the purpose of delay.

E. B. CONVERS.

Sworn to and subscribed before me, }
this 30th day of December, 1899. }

JAMES T. KILBRETH,
Notary Public,
New York County.

I hereby certify that I have examined the foregoing petition, and that in my opinion it is well founded, and that the case is one in which the prayer of the petitioner should be granted.

J. PARKER KIRLIN,
Of Counsel.

20798

No. 484 1/8

Br. of Stirlin for Petitioner. Con mo

Office Supreme Court U.S.
FILED
APR 11 1900
JAMES H. McKENNEY,
Clerk.

Filed April 11, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

TURRET STEAM SHIPPING COMPANY, LIMITED, Petitioner, AGAINST A. G. HALL *et al.*, Libelants, AND THE BOSTON FRUIT COMPANY, Respondent.	No. 484.

BRIEF IN OPPOSITION TO MOTION FOR EXECUTION.

The Turret Steam Shipping Company, petitioner, objects to the granting of the motion for execution herein, on the following grounds:

(1.) Though there are three parties to the cause, it is, nevertheless, a single cause, and the granting of the writ of *certiorari* herein brought the whole case in due form into this Court. The decree of the Circuit Court of Appeals is suspended by the proceedings under the writ. The motion for execution probably could not be granted, except on the remand of the cause or a

part of it from this Court to the Court below. There does not seem to be any precedent for such action.

(2.) The petitioner brought the cause into this Court to obtain relief from the judgment below, on the ground that it had been adjudged to pay a decree for damages caused by the neglect of servants of the charterer of the vessel, the Boston Fruit Company. Both Courts below found the Boston Fruit Company's servants were in possession and control of the vessel at the time of the collision, and that the faults which caused the collision were their faults. Under such circumstances, the primary liability for the damages for which the libelants now ask execution against this petitioner, would attach to the Boston Fruit Company, charterer of the vessel (*The China*, 7 Wall., at p. 70; *Homer Ramsdell Transportation Co.* v. *La Compagnie Generale*, 63 Fed. Rep., at p. 81), unless that liability is removed, as the Court below found it was, by the clause in the charter-party which provided that "the shipowner shall pay for the insurance on the vessel."

If this petitioner is correct in maintaining that the insurance clause did not have the legal effect attributed to it by the Courts below, then though the law imposes a lien on its vessel for the damages, the primary liability would attach to the charterer, the Boston Fruit Company, which would be adjudged, in the first instance, to pay the decree. The liability of the steamship would be secondary, or of the nature of that of suretyship.

The motion for execution, therefore, is in substance a request to require the surety to pay first, and to reserve for him his recourse over against the principal, instead of permitting the cause to follow its natural course and to require the principal to pay first, and the surety only in the event of the failure of the principal to discharge the debt.

(3.) By a stipulation embodied in the record, the damages have been agreed on, and interest will run on them as usual until the decree is paid by one defendant or the other. The case does not, therefore, present any circumstances of peculiar hardship differing from those incident to all cases of delays consequent on litigation.

The petitioner, therefore, respectfully submits that the motion should be denied.

Dated New York, April 10, 1900.

CONVERS & KIRLIN,
Proctors for Turret Steam Shipping Co., Ltd.,
Petitioner.

J. PARKER KIRLIN,
Advocate.

Office-Supreme Court, U.S.
FILED
MAR. 8 1901
JAMES H. MCKENNEY,
Clerk

Cf. No. 178.

By Mr. Kirlin for Petitioner

SUPREME COURT OF THE UNITED STATES

October Term, 1900

Filed March 8, 1901.

Turret Steam Shipping Company, Limited, Claimant of the Steamship Barnstable,
Appellant-Petitioner

against

E. G. Hall et al., Owners of the Gas Schooner Fortuna, Lebaniah Arthur W. Nunatt, Petitioner; Harold Sherman et al., Administrators, &c., Petitioners; Isaac B. Stewart, Administrator, Petitioner
Appellees

and

against

The Boston Fruit Company, Charterer of the Barnstable, Respondent
Appellee

No. 178

BRIEF FOR THE BARNSTABLE

Convers & Kirlin
Proctors for Turret Steam Shipping Co., Ltd., Petitioner-Appellant

J. Parton Kirlin
Advocate

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IV. The language of clause 22 of the charter-party cannot reasonably be extended so as to make the owner, whether actually himself insured or not, an insurer against claims for damage to other vessels caused by the charterer's negligence..... 40

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If the clause means that the owner was to provide, as well as to pay for, the insurance on the vessel, it would mean no more than that the owner was to insure in the customary way and to the customary extent. It would not mean that he assumed liability towards the charterer of whatever might be thus insured, nor would his underwriters on payment to him be debarred from suing the wrongdoer for the loss..... 41

V. Even if it be assumed that, under Clause 22, the owner was bound to provide, as well as to "pay for the insurance on the vessel," and to give the charterer the benefit of it, the charterer could not ask for the benefit of any insurance except "on the vessel" (*Barnstable*), and such insurance could not be offset against the owner's claim, in this proceeding, because the losses here involved would not be included in such an insurance . 49

1. The "insurance *on the vessel*," for which the owner was to pay, would not include insurance against "running-down risks," but would include only insurance against damage to the vessel insured, unless the import of the clause be extended by reference to some settled, practical construction of merchants and underwriters, under which it would necessarily include something additional 49

2. If it be admissible to receive parol evidence of the meaning of an "insurance on the vessel," the testimony in the record is overwhelming to the effect (1), that the words "insurance on the vessel" have no trade meaning different or more extended than their ordinary sense, as judicially defined.. 51

3. Insurance against running-down risks is not properly described as an insurance "on the vessel" 56

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4. The evidence did not warrant the conclusion reached by the Court below, that the charterer was entitled to the benefit of the shipowner's insurance in any amount 57

VI. If the insurance clause is susceptible of a construction that required the owner to insure against damages which the *Barnstable* might do to another vessel owing to the charterer's faults, and to give the charterer the benefit of such insurance, the obligation would extend only to the usual three-quarters of the running-down risk, and the Court erred in refusing to hold that the remaining quarter would have to be borne by the charterer 63

VII. The Court below erred in holding that, under the most extended construction of which clause 22 is capable, the owner was bound to insure the charterer against claims for personal injuries to persons on board another vessel, or for the death of such persons, caused by the faults of the charterer in navigating the insured vessel 65

LAST POINT.

Decree should be reversed, with costs 66

Supreme Court of the United States,

OCTOBER TERM, 1900.

TURRET STEAM SHIPPING COMPANY, LIMITED, claimant of the Steamship "BARNSTABLE,"
Appellant-Petitioner,

AGAINST

A. G. HALL *et al.*, owners of the late Schooner "FORTUNA," Libelants; ARTHUR W. NUNAN, Petitioner; HAROLD EMERNAN *et al.*, Administrators, &c., Petitioners; ISAAC B. STEWART, Administrator, Petitioner,
Appellees,

and

AGAINST

THE BOSTON FRUIT COMPANY, Charterer of the Steamship "BARNSTABLE," Respondent,
Appellee.

No. 178.

BRIEF FOR THE TURRET STEAM SHIPPING COMPANY, LTD., PETITIONER.

STATEMENT.

This case comes up by writ of *certorari* issued by this Court to review a decree in admiralty of the Circuit Court of Appeals for the First Circuit, entered May 11, 1899, which affirmed a decree of the

District Court of the United States for the District of Massachusetts (p. 105).

The decree of the District Court awarded to the libelants the sum of $20,867.46, their damages caused by a collision between the schooner *Fortuna* and the defendant steamship *Barnstable*, and dismissed the petition of The Turret Steam Shipping Company, owner of the *Barnstable*, against the Boston Fruit Company, the charterer of the steamship, which prayed that the charterer should be brought into the case as a party respondent, and should be adjudged to pay the damages, if any, because the negligence that caused the collision was that of the charterer's servants (p. 86).

The material steps in the courts below were as follows:

On January 15, 1896, the first libel was filed by A. G. Hall and others, owners of the schooner *Fortuna* against the steamship *Barnstable*, to recover damages for the loss of the schooner in a collision with the steamer, off Cape Cod, on January 13, 1896 (p. 2).

The steamer being within the jurisdiction, process of attachment was waived, and a claim to the vessel was filed by the master, E. E. Paine, on January 15th (p. 4). On January 16th, said Paine, Frank E. Peabody and Robert Winsor bound themselves in the sum of $25,000 to the libelants, that Paine should abide by and pay the amount of the final decree of the Court or of any appellate Court (p. 5.)

On February 20, 1896, Arthur W. Nunan, a seaman on the *Fortuna*, filed a petition to intervene as co-libelant, against the *Barnstable* (p. 6).

On April 18, 1896, an order was entered, substituting the Turret Steam Shipping Company, Limited, owner of the *Barnstable*, in place of E. E. Paine, as claimant (p. 9).

On the same day and before the time to answer had expired, the Turrent Steam Shipping Company,

Limited, as owner and claimant of the *Barnstable*, presented a petition to the Court, showing that certain libels had been filed against the steamer in consequence of the collision; that it had been compelled to furnish a stipulation for value in the sum of $24,800, and a stipulation for costs in the sum of $200; that the *Barnstable* was let out at the time of the collision by a charter of demise to the Boston Fruit Company; and that the charterer supplied its own officers and crew, who were navigating the vessel at the time of the collision, without the intervention of any local pilot. It further alleged that the faults, if any, of those in charge of the *Barnstable* were, in legal effect, the faults of the said charterer, the Boston Fruit Company, and not of the said petitioner, the owner of the steamship. The petitioner accordingly asked for process to bring the Boston Fruit Company into the case, as a party respondent under the fifty-ninth Admiralty rule, or in analogy with it, and prayed that, if fault should be found on the part of those in charge of the *Barnstable*, the said Boston Fruit Company, as between it and the shipowner, should be condemned to pay the damages so caused. A copy of the charter-party referred to was annexed to the petition (pp. 14, 18).

Thereupon, on April 8, 1896, by order of the Judge, a summons was issued to the Boston Fruit Company to appear before the District Court, on a day stated, to answer the foregoing petition (*Record*, p. 18).

On the 6th of November, 1896, the Boston Fruit Company appeared and filed its answer, admitting that it was the charterer of the vessel, and that the charter-party annexed to the petition was a copy of the contract; but it denied that it was liable for the acts of negligence, if any, of the master, officers, engineers or crew of the steamship, and alleged that, under the charter-party, the Boston Fruit Company did not assume liability, or become liable for damage done by collision by the said steam-

ship, which alone, it averred, was liable therefor, in a proceeding *in rem* (pp. 25, 26 and 27).

The Boston Fruit Company did not answer the libel of A. G. Hall and others; but it answered the subsequent intervening petition of Harold Emernan *et al.*, in which the Boston Fruit Company was joined with the *Barnstable* as a party respondent (pp. 19, 28).

By the answers of the Turret Steam Shipping Company, Ltd., to all the libels, and by the answer of the Boston Fruit Company to the petition of Harold Emernan, issue was raised as to the fault of those in charge of the *Barnstable* in connection with the collision.

Subsequently, however, after the taking of certain testimony in the case, the counsel for the *Barnstable*, and for the Boston Fruit Company, became satisfied that those engaged in the navigation of the steamer were solely to blame for the collision.

They, accordingly, agreed with the libelants that the damages amounted to the sum of $19,475, with interest from January 1, 1897 (p. 35); and they agreed between themselves on a statement of the facts on which the liability for those damages, as between the owner and the charterer, should be determined (p. 37).

The material provisions of the charter-party (p. 14), which was drawn up on a printed form, and is partly in writing and partly in print, are as follows:

"1. The owners agree [to let], and the said charterers agree to hire the said steamship for the term of 36 calendar months (or in charterers' option until the completion of any voyage commenced at any time before, but not completed until after the expiry of the said 36 months) commencing on the 1st to the 15th day of March, 1894, she then being placed at the disposal of the charterers in their loading berth in the port of Port

Antonio, Ja., at such wharf or place (where she may always safely lie afloat) as the charterers may direct, she being then tight, staunch, strong, &c. * * *; to be employed in any lawful trades between North America and/or North and/or South America and/or West Indies (not north of River St. Lawrence, or south of the River Platte) in any order as the charterers or their agents shall direct, River St. Lawrence debarred between October 1st and May 1st.

"2. The charterers shall provide and pay for all oils and stores for the vessel, gear, tackle and appliances for loading and discharging the cargo, and for all the provisions and wages of the captain, officers, engineers, firemen and crew who, excepting the guarantee engineer, shall be appointed by them. The owners shall appoint chief engineer for six months only, their (his) pay not to exceed that paid by the charterers in similar vessels. The owners shall maintain the vessel in a thoroughly efficient state in hull and machinery for the service, including winches, with chain gear and donkey boiler.

"3. The charterers shall also provide and pay for all the coals and fuel, port charges, pilotages, agencies, commissions, and all other charges whatsoever, excepting for painting and repairs to hull and machinery, and anything appertaining to keeping the ship in proper working order. Such repairs, as far as possible, and as is usual in such cases, to be done on board by the steamer's staff.

"4. The charterers shall pay for the use and hire of the said vessel at the rate of five hundred and fifty Pounds Br. Sterling (£550) each per calendar month, and at and after the same rate for any part of a month, the hire to continue from the time specified for terminating the charter until her delivery to the owner (unless lost) at the port of in the U. S. A. north of Hatteras. Payment whereof

shall be made in cash at New York semi-monthly in advance at the rate of $4.85 per Pound Br. Stlg. * * *

"5. That the cargoes shall be laden and/or discharged in any dock or at any wharf or place that charterers may direct where she can always safely lie afloat.

"6. That the whole reach, burthen and passenger accommodation of the ship, not being more than she can reasonably stow and carry, shall be at the charterers' disposal, reserving only proper and sufficient space for ship's officers, crew, tackle, apparel, furniture, provisions and stores. Cargo and/or coals and/or cattle may be taken on deck at the charterers' risk so far as the same do not endanger the safety of the vessel.

"7. The expense of loading and discharging shall be borne by the charterers, the stowage shall be under the control of the master, and the charterers shall be responsible for the same. Ballast and dunnage as required shall be found by charterers. Sufficient cellular water ballast to be provided by owners as per plan.

"8. An inventory of plated ware, crockery, linen, and all other fittings, shall be taken at the commencement of this charter. Anything lost or broken, or afterwards repaired, to be replaced or provided by charterer, fair wear and tear excepted.

"9. The vessel shall be put into dry dock to have bottom cleaned and painted, if required by charterers at owner's expense every 6 months. Time so occupied shall not be paid for by charterers.

"10. The master shall be under the orders and directions of the charterers as regards employment, agency or other arrangements; and the charterers

hereby agree to indemnify the owners from all consequences or liabilities that may arise from the master's signing bills of lading by their orders, or those of their agents, or in otherwise complying with same. The master, although appointed by charterers, to be satisfactory to the owners.

"11. If the charterers shall have reason to be dissatisfied with the conduct of the chief engineer during first six months, the owners shall, on receiving particulars of the complaint, investigate the same, and, if called upon, make a change in the appointments when the steamer is in. Owners have same privilege as regards captain and officers and engineers during continuance of charter.

"16. That the owners shall have a lien upon all cargoes and all sub-freights for freight or charter money due under this charter, and also to have a lien on the ship for all moneys paid in advance and not earned.

"17. In the event of loss of time from collision, stranding, want of repairs, break down of machinery, or any cause appertaining to the duties of the owner, preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease from the hour when detention begins until she be again in an efficient state to resume her service. Further, if in consequence of such deficiency, collision, want of repairs, break down or other causes, the vessel should put into any port or ports other than those to which she is bound, port charges, pilotages and other expenses at those ports shall be borne by the owners; but should the vessel be driven into a port or to anchorage by stress of weather, such detention or loss of time shall fall on the charterers. It is understood, in the event of steamer from above causes putting into any port or ports other than those to which she is bound, that the charterers are covered as to expenses, as the owners are by their insurance.

"22. That the owners shall pay for the insurance on the vessel.

"23. The benefit of all derelicts and salvages, as well as the loss of time and other expenses attendant thereon, to be for account of owners and charterers equally. * * *

"26. It is understood that charterers' captain joins at Middlesbro, and that the crew there shipped shall form the first complement" (pp. 14–17).

The *agreed statement of facts*, above referred to, was as follows:

"In the above entitled cause it is stipulated and agreed by and between the Turret Steam Shipping Company (Limited), claimant and owner of the steamship *Barnstable*, and the Boston Fruit Company, charterers, as follows:

"FIRST.—The collision alleged in the pleadings in the above entitled cause, was caused by the fault and neglect of those in charge of the navigation of the steamship *Barnstable* at the time, and was not caused or contributed to by the engineer of said steamship, nor by those in charge of the navigation of the libelants' schooner *Fortuna;* but this admission is made without prejudice to and without intent to waive any of the contentions of either of the parties hereto, regarding the liability of either as against the other, as set forth in the petition of said Turrett Steam Shipping Company (Limited), and the answer of said Boston Fruit Company thereto.

"SECOND.—The master, officers, engineers, firemen and crew of the *Barnstable* at the time of the collision, had been appointed by the Boston Fruit Company, and were paid by it under and pursuant to the charter-party referred to in said petition.

"THIRD.—The said steamship *Barnstable* had been engaged under the charter-party, a copy of which is attached to the said petition, for more than six months before said collision.

"FOURTH.—No complaint was ever made by either party under clause eleven of said charter-party.

"FIFTH.—There was no compulsory pilot on board said steamship at the time of the collision.

"SIXTH.—The collision was caused by the negligence of master, mates or crew at the time in charge of the navigation of the steamship.

"SEVENTH.—The master, mate, engineers, firemen and crew appointed as provided in said charter-party, were the only persons at the time in charge of the navigation of the said steamship, and responsible therefor.

"EIGHTH.—It is further agreed (subject to objection that the fact is immaterial, and the evidence incompetent), that the Boston Fruit Company had no insurance upon said steamship, and the petitioner, the then owner, carried a line of insurance on the vessel against sea perils, including collisions, but not for the full value of the vessel, the owner being in part uninsured" (pp. 37, 38).

This stipulation, in effect, admitted that the libel must be taken *pro confesso*, and left for further consideration the single question of ultimate responsibility for the loss, as between the owner of the *Barnstable*, who was not guilty of any fault, and the Boston Fruit Company, whose servants, by their negligence, caused the collision.

Five classes of damage were claimed and recovered under the libel and intervening petitions: (1) for the loss of the schooner (pp. 2, 4, 86); (2) for the loss

of the schooner's fishing and other outfits (pp. 2, 4, 86); (3) for the loss of the personal effects of the master and crew (pp. 4, 86); (4) for personal injuries received by the intervening libelant Nunan, a member of the schooner's crew (pp. 6, 86); (5) for damages resulting from the death of eight members of the schooner's crew, claimed under the intervening petitions of Emernan *et al.* (pp. 19, 20, 21, 86), and Stewart (pp. 29, 30, 86), who recovered as administrators of the estates of the deceased (p. 86).

The charterer contended, in both the Courts below, that by certain clauses in the charter-party, including the provision "that the owners shall pay for the insurance on the vessel" (Clause 22) the "company did not assume liability or become liable for damage done by collision by said steamship, and that said steamship alone was liable therefor in a proceeding *in rem*" (pp. 26, 27).

There was no specific plea that the charterer was exempt, by virtue of the insurance clause, from liability for damage to another vessel caused through the negligence of its servants, or that the owners, under that clause, assumed the risk of such damage, or that the charterer was entitled to the benefit of such insurance as the owner had effected.

The shipowner contended:

(1.) That, *prima facie*, the damages should be borne and paid by the charterer whose faults caused the collision.

(2.) That the insurance clause (22) did not give to the charterer the benefit of insurances effected by the shipowner, but that its liability remained for losses arising from its negligence, whether the damage from such negligence was suffered by the *Barnstable* directly, or attached to her through the medium of a lien for injuries done to another vessel.

(3.) That if the charterer is right in contending that the effect of the clause was to leave with the shipowner the risk of whatever losses would be covered by an "insurance *on the vessel*," still the losses here in suit are not such as would be covered by an ordinary policy "*on the vessel*" *Barnstable.*

(4.) That even if the shipowner, by virtue of the insurance clause, should be deemed to have assumed the risks that would be covered by a special additional insurance against "running down" risks, one fourth of the schooners losses ($3,643, p. 36) would not be within such insurance as customarily made, and the damages awarded for personal injuries, and for death, $4,900 (p. 36), would not be within it, and that hence, in any event, those items of damage, aggregating $8,643, and interest, should be borne by the charterer.

The cause was heard in April, 1897, by the Honorable Arthur L. Brown, District Judge for Rhode Island, duly assigned to hold the District Court for the District of Massachusetts (p. 85), who delivered his decision January 25, 1898 (p. 90). In the final decree the opinion is referred to as "an interlocutory decree" (p. 86).

The District Judge found that the charter of the steamer to the Boston Fruit Company, operated as a demise of the ship (p. 91); that the collision was caused by the negligence of the charterer's servants (p. 91), and that unless there was some contract between the parties which provided to the contrary, the liability for the collision, as between the charterer and the owner, would have attached to the former (p. 93). He further found, however, that clause 22 of the charter-party, which provided "that the owners shall pay for the insurance on the vessel" (p. 16), was "a most unequivocal expression of an intention to assume, and to relieve the charterer, from all risks that would be covered by the insurance on the vessel for which the owner was to pay" (p. 93); "that the

phrase 'insurance on the vessel' was used with an actual intention to cover what, according to its literal terms, it was capable of covering, running down risks as well as risks of direct damage to the steamer; and that the Turret Steam Shipping Company, Ltd., assumed the risk, not only of damage to the vessel herself by collision or otherwise, but also undertook to be responsible for damage which the vessel, by the negligence of the charterers' servants, caused *to another ship*, including claims for personal injuries to, and for loss of life of, persons on such other vessel" (*Opinion*, pp. 93-98).

These conclusions led to the dismissal of the shipowner's petition against the charterer, and to the condemnation of the steamer for the damages claimed in the libel and in the intervening petitions (p. 86).

From the final decree so entered the Turret Steam Shipping Company, Limited, appealed to the Circuit Court of Appeals for the First Circuit, which affirmed the decree in a short opinion by Judge Webb, based exclusively on the legal effect of the clause relating to insurance (pp. 103, 104).

It was assumed by the Court of Appeals, that the charterer would be bound to indemnify the shipowner against claims on the vessel, resulting from the collision, unless the contract of charter shifted the liability for such damage to the shipowner; but it was decided that the insurance clause did shift the liability, and had the effect of placing the risk of all insurable losses, however caused, on the shipowner. It was further held that all the losses here in question were such as, by the insurance clause, the shipowner undertook to assume, as between it and the charterer (p. 104).

The petitioner, The Turret Steam Shipping Company, Limited, thereon sued out this writ.

POINTS.

I.

The Court below correctly held that the damages arising from the collision were caused by the negligence of the charterer's servants, and that liability therefor must attach to the charterer, as between it and the shipowner, unless the terms of the charter-party devolve the liability on the shipowner.

1. It is immaterial to the point here presented for adjudication that the libel and the intervening petitions are against the *Barnstable in rem.*

The right of the libelants to decrees against the vessel has been assumed, by the courts below, under the general practice in this country to proceed, in collision causes, against the wrongdoing vessel directly, irrespective of her ownership, or of the agency of those in charge of her navigation (*The John G. Stevens*, 170 U. S., 113, 115–123).

Though perhaps not important in this case, it may be remarked that the maritime law, as administered in England, would not appear to justify a decree against the vessel *in rem* on the finding below that shipowners were not in control of the vessel, by their servants, at the time of the collision.

In the *Utopia*, 7 Asp. n. s., 408; [1893] App. Cas., 492, 499, Sir Francis Jeune, in delivering the judgment of the Privy Council, said:

"It was suggested in argument that, as the action against the Utopia is an action *in rem*, the ship may be held liable, though there be no liability in the owners. Such contention appears to their Lordships to be contrary to principles of maritime law, now well recognized. No doubt at the time of action brought, a ship may be made liable in an action *in rem*, though its then owners are not, because, by

reason of the negligence of the owners, or their servants, causing a collision, a maritime lien on their vessel may have been established, and that lien binds the vessel in the hands of subsequent owners. But the foundation of the lien is the negligence of the owners, or their servants, at the time of the collision, and if that be not proved, no lien comes into existence, and the ship is no more liable than any other property which the owners at the time of the collision may have possessed. In the recent case of *The Castlegate* ([1893] A. C. 52), in the House of Lords, language used by the present Master of the Rolls, in the case of *The Parlement Belge* (5 P. D., 197; 4 Asp. Mar. Law Cas., 234; 42 L. T. Rep., N. S., 273) which expresses the above view, was quoted with an approval, which their Lordships desire to repeat."

But, under the rule followed by the Courts below, it was competent for the Courts to determine the question of ultimate responsibility as between the vessel and the charterer. Though a lien for the collision damages attaches to the steamship, as the offending thing, the Court, having jurisdiction of both the charterer and shipowner, can adjust the rights, as between them, and place the loss on the one by whose fault it was occasioned (*Boyd* v. *Moses*, 7 Wall., 316, 320). It has been held in certain of the lower courts that in such cases the decree passes *in rem* against the vessel, with a provision that as between the owner and the charterer, the latter should pay the damages decreed, or if it failed to do so, that the owner have judgment against the charterer for the amount he may have to pay to the libelants.

The form of the proposed decree, as originally suggested by this petitioner, is quoted in the opinion of the District Judge (p. 91). It was in accordance with the practice adopted in numerous analogous cases (*The Centurion*, 57 Fed., 412, 415; *Salisbury* vs. *70,000 feet of lumber*, 68 Fed., 916; *Young*

vs. *Lehman*, 27 Fed., 383, 385; *The John Cottrell*, 34 Fed., 907; *Joice* v. *Canal Boats*, 32 Fed., 553; *The Alert*, 40 Fed., 836; *The City of Lincoln*, 25 Fed., 835; *Pierce* vs. *Winsor*, 2 Sprague, 35; cf. *In re New York and Porto Rico Steamship Co.*, 155 U. S., 523).

The English practice of bringing in third parties goes even further. It permits them to be cited in in common law cases, so that rights may be finally adjudged between all parties having common interests, which otherwise might have to be determined by further litigation. Sureties, guarantors, and all persons bound to indemnify defendants, are commonly cited in. (*Judicature Act* of 1873, § 23, Sub-div. 3; *Turner* v. *Hednesford Gas Co.*, 3 Exch. Div., 144, 151; *Benecke* v. *Frost*, 1 Q. B. D., 419, 421; *Ex parte Smith*, 2 Ch. Div., 51, 54; *Swansea Ship Co.* v. *Duncan*, 1 Q. B. D., 644, 648.)

Speaking of the analogous practice in equity, Mr. Justice Story (*Equity Pleading*, § 72) said:

"It is the constant aim of courts of equity to do complete justice, by deciding upon and *settling the rights of all persons interested in the subject matter of the suit*, so that the performance of the decree of the Court may be perfectly safe to those who are compelled to obey it, and also *that future litigation may be prevented* (*Milf. Eq. Pl. by Jeremy*, 163, 164; *Id.*, 39; *Cooper Eq. Pl.*, 33; *Caldwell* v. *Taggart*, 4 Peters R., 190; *West* v. *Randall*, 2 Mason R., 190 to 196; *Joy* v. *Wirtz*, 1 Wash Cir. R., 517; *Holland* v. *Prior*, 1 *Mylne & Keen*, 240). Hence, the common expression, that courts of equity delight to do justice and not by halves (*Knight* v. *Knight*, 3 P. Will., 333). And hence, also, it is a general rule in equity (subject to certain exceptions, which will be hereafter noticed) that *all persons materially interested*, either legally or beneficially, *in the subject matter of a suit are to be made parties* to

it, either as plaintiffs or as defendants, however numerous they may be, *so that there may be a complete decree, which shall bind them all* (*Mitf. Eq. Pl. by Jeremy*, 164; *Cooper Eq. Pl.*, 33, 34; *Id.*, 125; *Palk* v. *Clinton*, 12 Ves., 53, 54; *Hickok* v. *Scribner*, 3 John. Cas., 311, 315, 317, 318, 319; *Joy* v. *Wirtz*, 1 Wash. C. R., 517; *Caldwell* v. *Taggart*, 4 Peters R., 190; *Wendell* v. *Van Rennsselaer*, 1 Johns. Ch. R., 849). By this means the Court is enabled *to make a complete decree between the parties to prevent a future litigation* by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others, who are interested in the subject matter, by a decree, which might otherwise be grounded upon a partial view only of the real merits. When all the parties are before the Court the whole case may be seen; but it may not, where all conflicting interests are not brought out upon the pleadings by the original parties thereto (*West* v. *Randall*, 2 Mason R., 190, 191)."

This section is cited with approval in *Gregory* v. *Stetson*, 133 U. S., 579.

As the liability of the steamship, *in rem*, is not based on any presumption of fault on the part of the ship-*owner*, it is proposed now to inquire where the actual fault for the collision lay as between owner and charterer.

2. The real negligence that caused the collision was that of the charterer's servants.

a. The charter party operated as a demise of the ship, passing her management and control over from owner to charterer.

The material provisions of the charter are set forth in the preceding statement (Rec., pp. 14-17). The charterer agrees to "hire the said steamship." She is to be "placed at the disposal of the charterer";

"to be employed in any lawful trade, &c., in any order, as the charter shall direct." The charterer is to have exclusive possession of the whole ship (*clause* 6).

The charterer undertook to pay all the operating expenses of the vessel, including the *wages* of the captain, officers, engineers, firemen and crew, all whom it was to appoint (*clause* 2). The master, appointed by it, was under its direction as regards agency, employment and other arrangements, and it indemnifies the owner against the consequences of the master signing bills of lading, &c. (*clause* 10). It engaged to pay for all fuel, port charges and commissions; all expenses of loading and discharging, and "*all other charges whatsoever*," except (1) painting, (2) such repairs to the hull and machinery as cannot be done on board ship by the charterer's servants (*clause* 3), and (3) the insurance *on the vessel* (*clause* 22). All repairs that could be made on board the vessel were to be made by the charterer's staff (*clause* 3).

The charterer took the furniture of the vessel on an inventory (*clause* 8), agreeing to replace anything lost or broken, and to furnish anything further that might be required.

By clause 26, the first captain, who was to join the vessel at Middlesbro, was described as "*charterer's* captain."

By clause 2 the owners had the right to appoint the chief engineer for six months only. The purpose of this was to permit the builders of the engines to send a guaranty engineer to overlook them for the first six months of their use. This six months had expired prior to the collision (p. 37). At the time of the collision the entire force on board the vessel were appointees of the charterer (p. 37).

The owner was under no obligations by the charter, except (1) to furnish the vessel; (2), to make such necessary repairs to the hull and machinery as the charterer's servants were unable to make on board; and (3), to pay for the insurance on the ves-

sel. It did not undertake to send the ship on any voyages, or to carry any cargoes for the charterer.

It had no control over the ship, the master, the crew or the voyages. The charterer appointed, paid and controlled the officers, and determined the voyages and business of the ship.

Under the authorities, there is hardly room for a doubt that this charter-party effected a demise of the ship to the charterer (*Carver, Carriage by Sea;* 3d. Ed., §§ 113–117, *United States* v. *Shea*, 152 U. S., 178, 188, 189, 190; *Baumvoll Manufactur von Carl Scheibler* v. *Furness*, 7 Asp. Mar. Cas., 263; [1893], App. Cas., 8, 14, 15, 16, 17; *Clarke* v. *United States*, 95 U. S., 539; *Bramble* v. *Culmer*, 78 Fed., 497, 501, 503; *The India*, 21 Blatchf., 268, 269; *Meiklereid* v. *West*, 3 Asp. Mar. Cas., 129; 1 Q. B. Div., 428; *Reeve* v. *Davis*, 1 Ad. and El., 312; *Belcher* v. *Capper*, 4 M. and G. 502; *Newbery* v. *Colvin*, 7 Bing , 190; 1 Cl. and F., 286; *Sandeman* v. *Scurr*, L. R., 2 Q. B., 86, 96; *The Francis Wright*, 105 U.S., 381, 392; *Master of Trinity House* v. *Clark*, 4 M. and S., 288; *The Scout*, 1 Asp. Mar. Cas. (N. S.), 258; *The Alert*, 40 Fed., 836; *Gulzoni* v. *Tyler*, 64 Cal., 334; *Somes* v. *White*, 65 Me., 542; *Tucker* v. *Stimson*, 12 Gray, 487; *Webster* v. *Disharoon*, 64 Fed., 143.)

b. The conduct of the parties, in the execution of the contract, shows conclusively that it was a demise in its operation.

The conduct of the parties was considered material in *United States* v. *Shea*, 152 U. S., 178, 190, as showing the construction which they put on the contract in its execution. What was that conduct here? The charterer sent its own captain to Middlesbro to take the vessel from the builders' hands (*clause* 26). She had been a long time in the charterer's service, and had been manned and officered in accordance with the charter provisions. She was making a voyage for the charterer at the time of the collision.

The owner had never interfered even so far as to

make a complaint in respect to any of the officers, &c., under clause 11 of the charter (p. 37).

The ownership of the vessel had changed during the pendency of the charter, which had also been assigned; and the charterer had attorned to the new owner and had paid the agreed hire to it for a considerable time.

It is admitted that the collision was caused by the sole fault of the master, officers and crew of the vessel, who were appointed and paid by the charterer, under and pursuant to the provisions of the charter-party, and that they "*were the only persons at the time in charge of the navigation of said steamship and responsible therefor*" (*Stip.*, p. 37).

These conceded facts are equivalent to the finding in *United States* v. *Shea* (*supra* at p. 180), that the vessel was damaged in a collision "while in the service and under the exclusive management and control of the quartermaster's department," which the Court (p. 190) regarded as conclusive evidence of a transfer of "possession, management and control"—the very condition that it is the purpose and effect of a demise to accomplish.

c. From the fact that certain clauses in the printed form of the charter-party are not harmonious with the notion of a demise, the charterers, in the Court below, urged that the contract should be viewed as one of affreightment, and that the persons engaged in the navigation of the ship, though appointed by the charterer, should be deemed in law to be the agents of the shipowner.

The inaptness of some of the printed clauses arises from the fact, as has been explained by the witness Hall (p. 78), that when he devised the printed form some years ago he adopted many of the clauses from what is commonly called the "Government" form of charter-party (*Hall*, p. 78, *bundle of charter exhibits on file*, No. 1 and others).

It will be seen by a comparison of the *Barnstable's* charter with the Government forms contained in th

bundle, that clauses 3, 4, 6, 7, 10, 16 and 22 of the present charter-party are taken almost bodily from the Government form.

The fundamental difference between the Government form and the "net" form, as the *Barnstable's* charter is called, is that in the former the owners man and provision the vessel, while in the latter, she is manned and provisioned by the charterer (p. 52).

It happened in this way that some of the clauses in the form in suit, which would be apt in a government form, are inapt here; but as has been held in the cases presently to be referred to, such inaptness is by no means conclusive against a demise.

The provisions on which the charterer based the argument that the contract was not a demise are:

(1.) A slight limitation on the waters on which the ship may be employed (*Clause* 1).

(2.) The stipulation in regard to payment for the insurance on the vessel (*Clause* 22).

(3.) The terms with regard to repairs (*Clauses* 2 and 3).

(4.) The indemnity against the master's acts in signing bills of lading (*Clause* 10).

(5.) The stipulation for a lien, in favor of the owners, on cargoes and sub-freights for arrears of hire (*Clause* 16).

(6.) The stipulations in regard to furnishing the crew and paying for fuel, port charges, &c. (*Clauses* 2 and 3).

(7.) The provision that the master, although appointed by the charterers, is to be satisfactory to the owners (*Clause* 10).

The first five of these clauses were in the charter-party that was before the House of Lords in the case of *Baumvoll, &c.*, v. *Furness* [1893], App. Cas., 8, 15; the sixth was in the contract that was before this Court in *United States* v. *Shea*, 152 U. S., 178, 190, and the seventh was in the charter-party of the *Francis Wright*, 105 U. S., 381, 392.

In each of those cases it was contended that the presence in the contract of the clauses to which attention has been called was inconsistent with the notion that the parties intended a demise; but in every instance the contention was overruled.

Clauses of the charter could be referred to, which are inconsistent with the respondent's notion that it is a charter of affreightment. But this is unnecessary. Printed forms are designed for a variety of cases. If, in a particular case, the Court sees that certain clauses are inapt, they are disregarded (*Beddall* v. *British & F. Ins. Co.*, 143 N. Y., 94; *cases supra*). The operative words showing a transfer of the possession, command and control of the vessel, and the conduct of the parties in the execution of the contract, prevail over any mere inferences, based on unnecessary clauses which the parties have carelessly left in a printed form.

d. Whether the charter-party was a demise or not, it is manifest that the navigation of the steamer and the carrying of cargoes was the charterer's business (*The Turgot*, 11 P. D., 21, 24). The persons who were conducting that business were employed and paid by the charterer, and were performing functions which the charterer had undertaken to perform by his contract.

In the doing of the charterer's work, those who were engaged in the navigation of the ship at the time of the collision must be regarded as the charterer's servants and agents (*Young* v. *Lehman*, 27 Fed., 383, 385; and see *Boyd* v. *Moses*, 7 Wall., 316, 317, 320; *The Centurion*, 57 Fed., 412, 415).

3. The charterer, as the wrongdoer, is *prima facie* liable in these proceedings to the libelants and intervening co-libelants, as well as to the shipowner, for the whole amount of the damage to be awarded.

After a third party has been brought in under the 59th Admiralty Rule, the case proceeds as though such third party had been made a defendant originally (*Adm. Rule* 59).

The charterer was named as a defendant in the intervening petitions (pp. 19, 21, 29). An application was made to have the charterer joined as a respondent under the principal libel (pp. 21, 29).

Under Rule 59, the charterer should have answered the libel and the intervening petitions, as well as the petition of the Turret Steam Shipping Company, but, in fact, it answered only the petition of the Turret Steam Shipping Company (p. 25) and the intervening libel of Emernan and others (p. 28). The pleadings, though informal, suffice, however, to raise the material issues.

The case may be viewed in either of two aspects: first, as a claim by the injured libelants against the charterer to recover damages caused by the faults of their servants; or, secondly, as a claim by the owner, the bailor of the vessel, against his bailee, for indemnity for damage suffered by the owner through the medium of a lien on his vessel which was incurred by faults of the bailee.

a. Where a vessel is let out by a charter of demise, the charterer, or owner *pro hac vice*, as he is sometimes called, is liable for collision damages caused by the negligence of his servants (*Thorp* v. *Hammond*, 12 Wall., 408, 416, 417; *Cf. Williams* v. *Hayes*, 143, N. Y., 442). He is also liable on the contracts of the master.

The general owner is not liable, at law, in a personal action, for the *torts* of the charterer's servants (*Thorp* v. *Hammond* (*supra*), at pp. 416, 417; *Gulzoni* v. *Tyler*, 64 Cal., 334, 386; *Webster* v.

Disharoon, 64 Fed., 143; *Scott* v. *Scott*, 2 Stark., N. P., 438; 20 Rev. Rep., 438.

In *Gulzoni* v. *Tyler*, 64 California, 334, a claim was made for personal injuries sustained by the plaintiff while on board a vessel belonging to the defendants, but which, at the time of the accident, was chartered and was under the management and control of the charterer's servants. It was held that the owner of the vessel was not responsible for the damage. Sharpstein, *J.* (at p. 336), said:

"The rule, as stated in Shearman and Redfield on Negligence (§ 501) is that if the owner of property lets or lends it, and transfers the entire possession and control of it to another, the owner is not responsible for the wrongful use or mismanagement of it by the transferee. Whoever had the exclusive possession, management and control of the boat, its officers and men, was alone responsible for its mismanagement. And whether rightfully or wrongfully in such possession, the liability would rest on them alone. Under the rule *respondeat superior* this must be so. If the defendants were owners of the boat, but had not the possession, control or management of it themselves, or by their agents, servants or employees, they cannot be held responsible for the negligence or mismanagement of whoever had the exclusive possession, control and management of it."

It is also settled that the general owner is not liable on the master's contracts (*Tucker* v. *Stimson*, 12 Gray, 487; *Baumvoll*, &c. v. *Furness* [1893], App. Cas., 8); *Reave* v. *Davis*, 1 Ad. & El., 312; *Somes* v. *White*, 65 Maine, 312; *Thorne* v. *Hicks*, 7 Cowen, 696; *Wendover* v. *Hogeboon*, 7 Johnson, 307; *Leonard* v. *Huntington*, 15 Johnson, 298; *Sergeant* v. *Stark*, 12 New Hampshire, 332; *Fisk* v. *Manufacturing Co.*, 14 Pick., 491; 7 Amer. & Eng. Enc. of Law (2d ed.), pp. 194–196).

It is clear, under the above authorities, that the libelants and the intervening co-libelants are enti-

tled to judgment in these proceedings against the Boston Fruit Company.

b. The shipowner, if adjudged liable to pay the libelant's demands, is entitled to a decree over against the charterer for the amount.

If the steamship had been injured physically, instead of by the impairment of her title by the lien that arose from the collision, there would be no doubt that the charterer, unless absolved by some exception in the contract, would be liable for the damage.

In *Coupé Company* v. *Maddick* [1891], 2 Q. B., 413, the defendant hired a carriage and horse from the plaintiffs. The defendant's coachman, in place of taking them, as was his duty, to the stable, drove for his own purposes in another direction, and while thus engaged, the carriage and horse were injured, owing to his negligent driving. It was held that there had been a breach of the defendant's contract as bailee, for which he was liable to the bailor.

CAVE, *J.*, in delivering the opinion of the Court (p. 414), said:

"The question raised in this case is whether a person who has hired a horse and carriage for a year is responsible to the owner of the horse and carriage for damage done to them by the negligent driving of the hirer's servant, where the servant, instead of taking the horse and carriage to his master's stable in the ordinary course of his duty, for his own purposes and to serve a friend takes the horse and carriage in a contrary direction, and they are injured in consequence of his negligent driving while thus engaged contrary to his duty. * * * (p. 415). When a wayfarer is injured by the negligence of a person who is driving a carriage along a highway, he has a right of action founded on tort against the driver, and, if the driver is a servant driving in the course of his employment, he has also

a remedy against the master on the principle of respondent superior; but where a man hires a horse and carriage, there is *an implied obligation on his part arising out of the contract to return them in the condition in which he received them*, fair wear and tear and certain accidents excepted; and, if they are injured by the negligence of the hirer's servant while driving in the course of his employment, the latter's remedy is by action on the contract, and can be enforced against the hirer only and not against his servant * * * (p. 417). Where one of two innocent parties has to suffer a loss arising from the misconduct of a third party, it is for the public advantage that the loss should fall in such a way as to diminish the probability of such a thing happening again, or, in other words, that it should fall on that one of the two who could most easily have prevented the happening or the recurrence of the mischief. If, under these circumstances, the loss is to fall on the owner, who does not engage and cannot dismiss the servant, and who cannot recover over against him, the result is that it falls on one who could not have guarded beforehand against this accident, and who cannot prevent its recurrence, except by refusing to let out his horse and carriage in the future, which, so far from being a public benefit, is distinctly a public disadvantage, as tending to throw needless impediments in the way of business, and to render the letting and hiring of horses and carriages more expensive. If the loss is to fall on the hirer, it falls on one who will thereby be led to exercise greater care in the selection of his servant, who can punish the servant for his misconduct by dismissing him, and who, theoretically at all events, has a right of action against the servant.

"No case in point can be found on either side of the question; but, on the general considerations set out above, we are of opinion that the hirer is liable."

From the earliest times it has been held that damage to a hired vessel, caused by the bailee's negligence, must be made good to the bailor (*Cocks v. Bovyngton* (1551), 2 Select Pleas of the Court of Admiralty (by Marsden), 14; *Schultz and Markley's case*, 3 Mott & Hunt., (Ct. of Cl.), 56).

The bailee also answers for the total loss of the vessel, if caused by his fault (*Smith* v. *Bouker*, 40 Fed., 839; 49 Fed., 954; *Davey* v. *Chamberlain*, 4 Esp., 229; *Williams* v. *Hayes*, 143 N. Y., 442; *United States* v. *Yukers*, 60 Fed., 641).

The rule that requires the bailee to return the vessel free from damage caused by his fault, must also compel him to discharge all liens on her, and incumbrances on her title, for which he is responsible (*The Alert*, 40 Fed., 836; *The Centurion*, 57 Fed., 412; cf. *O'Brien* v. *Miller*, 168 U. S., 287, 304).

The relief to which the shipowner is entitled from the charterer, if it is adjudged liable, through the medium of a lien on the vessel, for the libelant's damages, may be granted in the same final decree that awards recovery to the libelants.

From the foregoing discussion, it is seen that the collision, and the damages which arose from it, were caused and occasioned by the charterer's faults; that the charterers are liable for such damages directly to the libelants, and indirectly to the shipowner, if the latter is compelled to pay the damages through the medium of a lien on the vessel; that the Court has jurisdiction of all the parties, can adjudicate the relative rights, and determine the ultimate responsibility for the collision losses, as between the different parties; and can adjudge that the charterer is liable in these proceedings for the whole loss.

It is proposed, now, to pass to a consideration of the question whether the terms of the charter-party devolve the losses, which *prima facie* should be the burden of the charterer, upon the shipowner.

II.

The Court below erred in the construction that it placed on clause 22 of the charter-party, which provides: "That the owners shall pay for the insurance on the vessel" (p. 16)

The effect attributed to that clause by the Court of Appeals, as expressed in the opinion of Webb, *J.*, was as follows:

"The insertion of this clause in the charter has no meaning unless it be to make such insurance as would profit the charterers, which could only be effected by insurance against losses which would fall upon them, against all risks attaching to them. This insurance clause must have been intended for their protection, and could have been understood by them in no other way, and the agreement of the owners was not to partially, but wholly to protect them, and to relieve them of the expense of insuring themselves. In effect, it said to the charterers,—Your only responsibility will be to pay the hire of the ship; all other things shall be our care and at our charge. If, having so agreed, they chose to take the hazard of loss and to save the cost of a policy, they made themselves insurers, and after the loss cannot throw it upon the charterers" (p. 104).

The petitioner maintains that this broad construction is not authorized by the language of the clause nor by any reasonable and proper interpretation of it.

Bearing in mind that claims before the Court amounting to $4,900 are for personal injuries to members of the crew of the *Fortuna*, and for the death of a number of such persons, none of which would be insurable under any known form of marine insurance (*McArthur, Marine Ins.*, 2 Ed.,

pp. 321, 324; Appendix III., pp. 372-378; 1 *Arnould, Mar. Ins.*, 3d Ed., 20, 21; 2 *do.*, 673; form of collision clause, 1 *do.*, 238, 239; *Taylor* v. *Dewar*, 5 B. & S., 58; *Gourlie*, p. 72); and that one-quarter of the remaining damages, for the loss of the schooner, outfits and effects, amounting to $3,643, is not insurable at all in some companies (*Gourlie*, p. 73), and customarily is not insured (3 *Joyce on Ins.*, § 2755; *Gourlie*, pp. 70-75), and, in the present case, was not insured (p. 38), it will be readily seen how extreme and farreaching the construction of this clause that was adopted by the courts below, really is. If the parties intended to make such an unusual engagement, it would have been more natural for them to have used words more clearly embodying their design, and to have avoided the use of a phrase—"insurance *on the vessel*"—which has a settled and judicially declared meaning that is too narrow for their purpose (1 *Arnould, Mar. Ins.*, 3d Ed., 20, 21; 2 *do.*, 673).

The petitioner's contentions, with reference to this clause, are:

1. That the insurance clause was not intended to require the owner to *provide* insurance, or in the alternative, to take the risk of damage which might be covered by it. It was introduced into the printed form on which this charter was drawn up merely to prevent the shipowner from claiming that the *cost* of insurance should be paid by the charterer, under clause 3 of the form, which provided (p. 14) that the charterer should pay not only certain stated expenses, in connection with the ship and her business, but also "*all other charges whatsoever* excepting for painting and repairs to hull and machinery and anything appertaining to keeping the ship in proper working order."

2. That the language of this clause cannot reasonably be extended so as to make the owner, whether

actually himself insured or not, an absolute insurer of the charterers, and to cut off the subrogation of the owners' underwriters on the vessel.

3. That, at the utmost, the clause should be interpreted as requiring the shipowner to provide an insurance *on the vessel* (*Barnstable*) only; it would not obligate him to insure against damage which the steamer might do to another vessel. The Courts below, apparently, have fallen into the error of following the Massachusetts doctrine holding that a policy "*on the vessel*" covers damages which the vessel insured may do to another vessel (*Nelson* vs. *Suffolk Ins. Co.*, 3 Cushing, 477), instead of the rule prevailing in this Court under which a policy "on the vessel" does not include damage which the insured ship may do to other vessels (*Insurance Co.* vs. *Sherwood*, 14 How., 351).

4. That if, in any view, the clause is susceptible of a construction that would require the owner to insure against damage which the ship insured might do to another ship, such additional insurance should be held to extend only to the usual three-quarters, in accordance with the customary rule for the insurance of such risks.

5. That on the most extended construction, of which the clause is capable, it would not obligate the owner to insure against the claims for personal injuries to persons on board another vessel, or against claims for the death of such persons.

III.

It was not the purpose of the insurance clause to require the owner to provide insurance for the charterer's benefit.

1. The introduction of the insurance clause, in the printed forms of charter-parties that are in

common use, appears to have been intended originally for the purpose of specifying which of the parties should bear the expense, if any, of insurance.

The insurance clause was not specially introduced in the charter party of this steamer for the purpose of embodying any previous agreement on the subject. On the contrary, it was a part of the printed form on which the contract was drawn up. The clause had existed, in a different sequence, in another kind of time charter for many years (*Bennett*, p. 62, x-Q. 214).

The printed form that was used by Hurlbut & Co., the brokers who negotiated the charter, had been drawn up by the witness Hall, a member of that firm, about 1886 or 1887, and had been used by them ever since. It was based originally on a copy of the time charter form of Lamport & Holt (who for many years operated a line of chartered steamers between New York and ports in South America), and on the foreign charters of three steamships named *Scythian*, *Pirate* and *Kenelworth*, whose business was in the hands of Hurlbut & Co., but whose charters had evidently been made abroad (*Hall*, p. 78).

The common form of time charter is what is called the "Government" or "Admiralty form." Under this form the owner mans and provisions the ship, during the period of the charter (*Bundle of charter-party forms*, Ex. 1).

It is evident, from a comparison of Hurlbut's form (p. 14) with the Government form of time charter (*Petitioner's Exhibit* 1 *in the bundle of charter-parties*), and with all the common forms based on it (*Petitioner's Exhibits* 2 *to* 20), that Mr. Hall carried into his *net* form, many of the provisions of the standard Government form, which were better adapted to that form than to his own.

The insurance clause was one of those that he took in the same words, from the Government form, but for some reason not explained, he put it in a different sequence (*Barber*, p. 83).

The petitioner produced to the Court all the standard forms of charter-party that its counsel could find in New York, and three prominent English forms, all which, with a single exception, contains the insurance clause, in the same form as in the *Barnstable's* charter.

It is in the same words in the Government form, where the owner provides the crew, as in the net form, where the charterer provides it. Presumably, therefore, it is introduced for the same purpose in both, though the liabilities of owner and charterer are quite different, under the different forms. In some instances it is provided that the insurance shall be paid for *by the charterer* (*Latson* v. *Sturm*, 2 Benedict, 328), though the provision that this charge shall be paid by the owner is more common (*The Francis Wright*, 105 U. S., 381-2; *Baumvoll, etc.* v. *Furness* [1893], App. Cas., 8, 15).

Those who are acquainted with the business of operating chartered vessels, know that certain usual charges will have to be borne by one or both the parties to a contract for the hire of a ship under a time charter. Hence, there are found in all such contracts an enumeration of the expected charges to be borne by each and a general clause providing that one of the parties shall pay all further charges that are not specified to be paid by the other. The more common form of this division of expenses is as follows:

"(1.) That the owners shall provide and pay for all the provisions and wages of the captain, officers, engineers, firemen and crew; *shall pay for the insurance on the vessel;* also for all engine room stores, and maintain her in a thoroughly efficient state in hull and machinery for the service.

"(2.) That the charterers shall provide and pay for all the coals, fuel, water for boilers, port charges, pilotages, light and dock dues, dunnage, stevedoring, agencies, commissions, foreign consulages, expenses

on the cargo they may put on board, and *all other charges whatsoever*, except those before stated" (*vide Petitioner's Charter Exhibits* 1 *to* 19).

In the form of charter-party here in suit, these provisions appear in substantially similar form, except as regards wages and provisions, but in a different sequence:

"2. The charterers shall provide and pay for all oils and stores for the vessel, gear, tackle and appliances for loading and discharging the cargo, and for all the provisions and wages of the Captain, officers, engineers, firemen and crew, who, excepting the guarantee engineer, shall be appointed by them. The owners shall appoint chief engineer for six months only; his pay not to exceed that paid by the charterers in similar vessels.

"The owners shall maintain the vessel in a thoroughly efficient state in hull and machinery for the service, including winches, with chain gear and donkey boiler.

"22. That the owners shall pay for the insurance on the vessel.

"3. The charterers shall also provide and pay for all the coals and fuel, port charges, pilotages, agencies, commissions and *all other charges whatsoever*, excepting for painting and repairs to hull and machinery and anything appertaining to keeping the ship in proper working order. Such repairs, as far as possible and is usual in such cases, to be done on board by the steamer's staff" (*Rec.*, pp. 14-17).

If clause 22 be moved back to its original sequence, the provisions in this charter would follow the common scheme of dividing the charges between the charterer and owner, and of providing that the charterer "shall *pay all other charges whatsoever*," &c. It is fair to assume, therefore, that the clause

was introduced for the same purpose in both kinds of charters.

The evidence of the witnesses leaves little doubt as to what that purpose was. It is shown that insurance on hulls, in some amount, is a general custom (pp. 69, 79); and, of course, there is a charge for it. If it was not provided that this charge should be borne by one or the other, specifically, the party who was bound to pay all unspecified charges —"all other charges whatsoever"—might be called on to pay an insurance charge.

This explanation of the origin of the clause is givenby a number of competent and experienced witnesses, who are practically uncontradicted.

Herbert Barber, a witness of thirty-five years' experience, produced his own form of charter-party (Petitioner's Exhibit 7), and testified as follows:

"Q. 4 (Witness is shown charter-parties, Petitioner's Ex. 7). Is that your form of time charter? A. That is one of our forms of time charter; yes.

Q. 5. I notice in the clause No. 1 in that form, a provision that the owners shall pay for the insurance of the vessel.

Q. 6. Is that the usual form that is in all time charters? A. That is the usual clause.

Q. 7. And the form of it? A. Yes.

Q. 8. Do you know Hurlbut & Co.? A. I used to know them.

Q. 9. Look at clause 22 in their form and say whether that is the same clause and in the same form? A. It is the same clause, but not in the same sequence.

Q. 10. Not in the same sequence? A. No.

Q. 11. But the same in words, is it not? A. Yes, same exact words.

Q. 12. How does that clause come to be in time charters? A. You know in most time charters there is a clause about what each shall pay for. The owner shall pay for the provisions, wages, fees of the captain,

officers and crew; and then the next clause is the charterer shall provide and pay for all the coals, port charges, pilotages, commissions, consulate fees, except those pertaining to the captain, officers and crew, *and all other charges whatsoever;* and for that reason, under clause 1, they provide that the insurance of the vessel is to be paid by the owners.

Q. 13. That being a usual charge on all vessels? A. Insurance is a usual charge; yes" (pp. 83, 84).

Ramon G. Cadiz, a witness of twenty-one years' experience, who has charge of the time chartering department of Funch, Edye & Co., a large New York firm, produced the Government form of time charter in use by his firm (p. 75; *Petitioner's Exhibit Charter-Party No.* 19). He testified:

"Q. 6. (Paper shown witness.) Is this a copy of the time charter of your firm? A. Yes. That is our regular Government form of time charter (*paper put in and marked Barnstable Ex.* 19).

Q. 7. I notice in that charter-party a provision in the first numbered paragraph reading, 'The owner shall pay for the insurance of the vessel.' Is that a usual clause in all time charters? A. Yes.

Q. 8. How does that clause come to be there? A. It is one of the clauses introduced for the purpose of establishing that the owner must pay the insurance on the vessel.

Q. 9. What is the occasion for enumerating that as a charge against the owner? A. Well, if it was not there, the charterer might, under paragraph No. 2 be called upon to pay the insurance on the vessel, on the strength of the clause stating that all other charges whatsoever except those before stated are to be for account of the charterers" (p. 76).

Bennett, a witness for the charterer, clearly admits over and over again that this was the real purpose of the clause.

"The intention is clearly that *if* the *owner* insures

the vessel *he must pay* for the insurance, not the charterer" (p. 48).

The witness meant to aid the charterer, so far as he could, by expressing his own opinion, which was not, however, based on any settled practice, or on experience in the adjustment of claims, that the owner's insurance was intended to inure to the charterer's benefit. But, even with that intention, it is manifest, from the whole of his evidence, that he understood that the purpose of the clause was to specify clearly the party who was to bear the insurance charge, rather than to provide who should benefit by it (pp. 44, 46, 47, 48, 50, 55, 56).

The fact that the insurance clause, in identical form, is found in the types of time charter, under which the shipowner furnishes the crew, materially weakens the arguments on which the District Judge reached his conclusion, as to its import, in the *Barnstable's* charter, where the crew was supplied by the charterer.

He argued that the risk that a collision by the negligence of the charterer's servants might result in damage to another vessel, would probably be in the contemplation of the parties at the execution of the charter; that they would be likely, therefore, to contract with reference to it; and that presumptively the insurance provision, as contained in clause 22, was designed to cover such a case (pp. 97, 98). How will this reasoning apply in cases where, as in the government form, the crew is supplied by the owner, yet the insurance clause is in the same form? In such cases the *owner's* servants being in command and possession of the ship, the charterer would have no interest in requiring the owner to insure the ship, as any loss or damage which might be caused or occasioned either to the ship herself, or to another, could only be through the fault of the shipowner's servants, and so could not possibly give rise to any claim for indemnity from the charterer. It is obvious, therefore, that in the government form the introduction of the clause must be for some other

purpose than that suggested by the District Judge in this case. What other purpose can be suggested, however, except that which is furnished by the witnesses, who say, that the charge for insurance is specified to be paid by the shipowner, in order to bar a claim on his part, that it should be paid by the charterer, under the general undertaking to pay all non-enumerated charges? As the clause was obviously imported into Hurlbut's form, from the govment form, it is difficult to argue that it has a meaning, here, which it could not possibly have had in the form from which it was taken.

The construction of the insurance clause for which the petitioner contends is further supported by the fact that it often appears in charter-parties, not as an affirmative statement that the owner *shall pay for* the insurance on the vessel, but negatively in the form of a proviso, that the charterer *shall not* pay for it. Thus, in *The Francis Wright*, 105 U. S., 381, 382, the charterer agreed "to man, coal and victual steamer, and pay all expenses of every nature, including port charges, &c., connected with running of the steamer, *except insurance on vessel* and repairs"; and in *The Scout*, 1 Asp. Mar. Law Cas., N. S., 258, the charterer agreed to pay "all expenses of the crew, fuel, oil, tallow, dues, repairs, and all other costs and charges incidental to the running of the steamer, *excepting only insurance.*" * * * In other instances (*e. g.*, *Latson* v. *Sturm*, 2 Ben., 327) it is specifically provided that the charterer shall pay this charge. But, unless there is a clearly expressed intention that the charterer shall have the benefit of the insurance there is no usage or practice that the charterer shall benefit in any way by the shipowner's insurance (*Bennett*, p. 50; *Cadiz*, p. 76; *Hall*, pp. 78, 79; *Barber*, p. 84).

The fact that the clause deals only with the *expense* of insurance, and *omits all reference to a duty*

to provide it, confirms the petitioner's argument as to its purpose.

Mr. Hall, the member of the firm of Hurlbut & Co., who composed the blank form on which this charter-party was made, states that it was not the intention of clause 22 to bind the owner *to provide* insurance (pp. 78, 79, 81, 82). He apparently introduced it simply because it was "a common phrase used in making time charters" (p. 81).

The charterer argues that the intent was to require the owner to *provide* insurance against the charterer's negligence, or to become an insurer itself, if no insurance was effected. But such an implication, plainly, should not be drawn if it is not the necessary, and only reasonably possible construction of the clause. Another equally reasonable interpretation of it would be that the charterer might desire to effect insurances "on the vessel" himself, and charge the cost to the owner. His insurable interest in the vessel is clear (1 *Arnoned on Ins.*, 3d Ed., 53). In this view of the clause, the charterer would have no right to invoke it here, because he had failed to provide the insurance, and had made no demand on the owner for the cost of it.

If inferences as to the intent of the clause are to be indulged in, the owner might say that as he had agreed to pay the cost of insurance, he should never be called on to bear any loss that could have been saved by insurance, which might have been provided by the charterer; and that, in this case, he could not fairly be charged with even the cost of a policy that would have covered the losses, because none was effected by the charterer, and no demand was ever made for the cost of insurance to cover the charterer's risks. The liability here is primarily a charterer's liability; the risk of it is *prima facie* the charterer's risk. So far as *providing* the insurance of such a risk is concerned, the inference that the charterer was bound to provide it, is much stronger than that the owner was to do so. Where it is a

question of devolving a liability from one who, under ordinary rules of law, is bound to bear it, to one who by the same rules is not subject to it, the contract which is claimed to have such an effect ought to be clear beyond all fair and reasonable doubt.

2. The District Judge erred in finding that it was "proved by the charterer, and is not disputed, that the actual *understanding of the owner* at the execution of the contract was that the phrase included insurance against risks of all kinds" (p. 96).

This finding is stated to have been predicated on the testimony of Bennett, the broker who negotiated the charter.

He testified: "I have had a good deal of experience in various insurance claims, so much so that I claim—* * * so much so that I clearly expressed to the owner that he would have to pay for all insurance on the vessel in any way, shape and manner, against stranding, collisions and everything, as is usually done in all vessels, unless he wanted to take the risk and not insure" (pp. 96, 44).

This statement of the witness was not responsive to any question addressed to him (p. 44), and was received by the Court over the objection to all testimony as to conversations prior to the signature of the charter "as immaterial, irrelevant and incompetent, and inadmissible to explain the writing" (p. 40). These objections were duly taken at the trial, and were noticed by the Court in the opinion (p. 96).

It was incompetent for Bennett to give parol contemporaneous evidence that the words, "insurance on the vessel," in the charter meant something different from what they said (*Seitz* v. *Brewers' Co.*, 141 U. S., 510). The evidence was received as explaining an uncertainty in words that were assumed to be susceptible of two constructions (p. 96). But they are not susceptible of two constructions (*Moran* v. *Mather*, 23 Wall., 492, 499, 500). They have but one legal meaning (*General Ins. Co.* v. *Sherwood*,

14 How., 351, 361, 367), and that meaning, as judicially determined, is at complete variance with the sense in which the witness Bennett says that he told the former owner that he (Bennett) understood them.

It is to be observed that Bennett does not state anything that the former owner *said to him*, from which a finding can be fairly made as to "the actual undestanding of the *owner*." On the contrary, it seems that he merely expressed *his* opinon *to* the owner, if, indeed, he did even that. It is not asserted that the owner coincided in this view; so that the evidence, if admissible, really does not prove any understanding except Bennett's.

Bennett's first statement of the conversation is worthy of notice (p. 42):

"Q. Did you have any conversation with Mr. "Craggs (the prior owner) in regard to that clause? "A. I did—several.

"Q. Please state the substance of that conversa-"tion? (Objection.)

"A. I told him that he would have to insure for "his vessel *the same as the charter-party stated*" (p. 42).

From this it would appear that he merely called the owner's attention to clause 22 as it stands.

But, whether Bennett's statement to Craggs was of the tenor first stated, or of that afterwards testi fied to, it is inconclusive, (1) because it made no reference to insuring against damage which might be done to other ships; (2) because it does not assume to say that Craggs coincided in Bennett's view, and therefore did not bind him to any *agreement dehors* the contract, and (3) because it was inadmissible as against the Turret Steam Shipping Company, the purchaser of the vessel and assignee of the charter-party, who was not proved to have had any notice of the conversation, and therefore, in making over the charter, was only bound by the obligations imported by the words of the clause in their ordinary

sense, or in the sense of some settled trade meaning (*Paige* v. *Cagwin*, 7 Hill, 361; *Bristol* v. *Dame*, 12 Wend., 142; *Clews* v. *Kerr*, 90 N. Y., 633; *Truax* v. *Slater*, 86 N. Y., 630; *Taylor* v. *Van Tassel*, 86 N. Y , 642).

The fact of the transfer of the ownership of the vessels and of the charter-parties from Craggs to the Turret Steam Shipping Company, and of the attornment of the Boston Fruit Company to the vendee, prior to the collision, are admitted in the respondent's answer to the petition (p. 26).

IV.

The language of clause 22 of the charter-party cannot reasonably be extended so as to make the owner, whether actually himself insured or not, an insurer against claims for damage to other vessels caused by the charterer's negligence.

It has been argued by the charterer, and decided in the Court below, that, by virtue of the insurance clause, the shipowner assumed the risk of all damage that might be caused to other vessels, or to those on board of them, by collision due to the charterer's faults. The finding of the Court of Appeals, in effect, makes the shipowner a guarantor of the solvency of the underwriters on the partial insurance that he effected for his own protection (p. 38), and of its collection; compels him to assume a considerable liability for losses for personal injuries and death, which are not insurable under a marine policy, and effectually cuts off the right of subrogation of the shipowner's underwriters against the wrongdoer who caused the damage.

In all three respects, it is submitted, the conclusion of the Court of Appeals was unwarranted.

If the clause stated that the owner was to provide, as well as to pay for, the insurance on the vessel, it would mean no more than that he was to insure in the customary way and to the customary extent. It would not mean that he assumed liability towards the charterer of whatever might be thus insured, nor would his underwriters on payment to him be debarred, by the clause, from suing the wrongdoer for the loss.

In *The Lord of the Isles* [1894], Prob., 342, the plaintiffs chartered a tug from the defendant under mutual covenants that the plaintiffs should indemnify the defendant against any loss, damage, expenses or costs to which the defendant might be put by reason of collision, salvage services, or otherwise, in connection with the tug, and the defendant agreed to insure the tug and keep it insured fully against all risks, including collision risks, and the risk of damage to or by craft or vessels in tow of the tug, or of such vessels or craft colliding with others; and in case any craft or vessel that the tug might be towing should be damaged by or should occasion damage to any craft or vessel, or other wise, which should be covered by the insurance, then the defendant would indemnify the plaintiffs in respect of all such damage to the extent of all moneys received by him under such insurance. The defendant effected insurance pursuant to these undertakings.

Subsequently, while the tug was swinging some barges which she had in tow above London Bridge, the tow rope broke, and the barge collided with and damaged another vessel. In an action by the owners of that vessel against the plaintiffs, they, as defendants in that action, admitted their liability, and certain damages were assessed against them, which they called on the defendant, in the case under discussion, to pay. The defendant presented the claim against their underwriters, but the latter denied their liability. The defendant then offered to turn

over the policies to the plaintiff, but the latter insisted that the defendant should sue the underwriters, or, alternatively, himself pay over the money pursuant to the agreement above stated. Plaintiffs then brought suit, but Bruce, *J.*, dismissed the complaint, holding that the defendant, in insuring, was merely the agent of the plaintiff, and did not guarantee either that the underwriters were solvent, or that they would pay the claims which might be presented against them. It was argued by the plaintiffs' counsel that the defendant, having undertaken to insure, was bound to pay the loss, and to look to insurance for his indemnity, but this contention was overruled.

In a number of English cases, the Courts have considered the effect of provisions in charter-parties relating to the payment of advanced freight "subject to insurance." *Carver, Carriage by Sea*, 3d Ed., § 566, deals with a number of such cases.

"Where a charter-party provides that freight shall be payable in advance 'subject to insurance,' this merely means subject to deduction of the cost of insurance. It throws no duty on the shipowner to insure the freight advanced for the benefit of the merchant (*Jackson* v. *Isaacson*, 27 L. J., Ex., 392; 3 H. & N., 405; *Watson* v. *Shankland*, L. R., 2 H. L., Sc. 304).

"The arrangement amounts to this, that the shipowner, in consideration of the convenience of having the freight advanced, is willing to bear the cost of insuring that advance. That cost is therefore allowed, or returned, to the merchant out of the advance when he makes it. And the shipowner thus, in effect, bears the risk (represented by the cost of insurance) of the freight not being earned (cf. per Charles, *J.*, *Smith* v. *Pyman* (1891), 1 Q. B., 42).

"In *Rodocanachi* vs. *Milburn* (17 Q. B. D., 316; 18 Q. B. D., 67; *cf. Hill* vs. *Scott* (1895), 2 Q. B., 371, 713), it was contended that as the shipowner, under this clause, bears the cost of insuring the ad-

vances, it has the effect of relieving him from responsibility for any kind of loss of the advances, or of the increased value in the goods which represents them. Charterers were there to make advances 'on account of freight at current exchange subject to insurance only.' They did so, and the cost of insurance was allowed to them. On the voyage the cargo was lost by the negligence of the master, and the question arose whether, in calculating the damages payable by the shipowner, deduction should be made from the arrived value of the cargo of the whole of the charter freight, or only of the freight which remained unpaid. Manisty, *J.*, held that the whole freight must be deducted, on the ground that the charterers had agreed, as to the sum advanced, 'not to look to the shipowners, but to their rights under their contract of insurance,' but his ruling was reversed by the Court of Appeal. And in *Dufourcet* v. *Bishop* (18 Q. B. D., 373; so also, *Great Indian Pen. Rail. Co.* vs. *Turnbull*, 53 L. T., 325) under similar circumstances, the cargo owner was allowed to recover the advanced freight, which he had insured, for the benefit of his underwriters."

In *Dufourcet* v. *Bishop*, 18 Q. B. D., 373, above referred to, goods were shipped on the defendants' ship under a charter-party, which provided that, if required, the whole freight should be advanced by the charterer subject to a deduction for interest and insurance. The freight was paid in advance, and the amount was insured by the charterers. The charterers sold the goods to the plaintiffs at a price covering cost, freight and insurance. The cargo was lost by the negligence of the defendants.

In an action for the loss of the goods, it was held that the plaintiffs were entitled to recover as part of the damages sustained by them, the amount of the advanced freight, which was included in the price paid by them for the goods; for the insurers of the freight, who had indemnified the plaintiffs, were

entitled to be subrogated to the rights of the plaintiffs in respect of the advanced freight, and to have the action maintained for their benefit for the amount insured, as it would, but for the insurance, have formed part of the damages to which the plaintiffs would have been entitled.

Denman, *J.*, in delivering judgment (p. 378), said:

"The defendants, the shipowners, further contended that no action would lie against them at the suit of the plaintiffs in respect of the £600 advanced freight because by the charter-party and bills of lading the plaintiffs and Gibbs & Co. were bound by the stipulation as to advanced freight, and the freight of £600 had been advanced accordingly, and the plaintiffs and Gibbs & Co. undertook to insure and look to the underwriters for any loss which could be covered by insurance, and that inasmuch as the plaintiffs could not recover back the £600 from the defendants on their own account (according to *De Silvale* v. *Kendall* (4 M. & S., 37) and other cases), neither could they sue for the benefit of the insurers in order to indemnify them against a risk for which they were liable under the policy, but for which the defendants, the shipowners, were not liable at all.

"I am of opinion that this defense merely amounts to an ingenious attempt to defeat the City of London Insurance Company of its right to be subrogated to the rights of the plaintiffs as against the defendants in respect of so much of the damages recoverable by the plaintiffs as they had covered by the policy of the £600, on which the company had been compelled to pay the plaintiffs that amount.

"I think it clear from the decision of the Court of Appeal in the very recent case of *Rodoconachi* v. *Milburn* (*Ante*, p. 67) that upon the loss of the vessel by the negligence of the defendants, the plaintiffs were entitled to damages, including the £600 for which they were liable to Gibbs & Co., as part of the value of the cargo, at the end of the voyage.

I think it equally clear that they had no right as against the insurers of that advanced freight to barter away their right to recover it as part of the damage sustained by them by the loss of the cargo."

Further (p. 379) the learned Judge said:

"It was admitted on the hearing that the insurance company had insisted on the action being continued for their benefit in respect of the £600 in question. I do not think that the cases cited by Mr. Barnes are at all inconsistent with this view. Though they establish as a general rule that money paid by way of advanced freight cannot be recovered back on the failure of the voyage, they by no means establish that where the cargo owner has, as part of the price of the goods, paid or become liable to pay a sum for freight in advance, and the goods are lost by negligence of the shipowner, he may not, as part of his damages (which are to be considered with reference to the value of the goods at the port of arrival), be allowed as against the shipowner an amount equal to the freight so advanced, and, if he happens to be partially indemnified against that loss by an insurance of that very amount of advanced freight, I can see no reason why the insurer of that amount should not be entitled to sue in his name for it as part of the damage which the cargo owner, but for the insurance, would have sustained by the defendant's negligence. I think for the above reasons that the plaintiffs are entitled to judgment for £600, and I give judgment accordingly for that amount, with costs."

In *Hill* v. *Scott* (1895), 2 Q. B., 371; on Appeal, 713, the plaintiff shipped certain goods on the defendant's steamer with instructions to the defendant to insure them. They were, in fact, insured by the defendant. It was claimed by the defendant that his arrangement with the plaintiff was that the goods should be carried without liability on the de-

fendant's part for negligence, and that the plaintiff agreed to look to the avails of insurance for any losses he might sustain.

In the Court of Appeal, Lord Esher, M. R., disposed of the point as follows:

"The effect of the defense raised by the defendant's solicitors is this—that it was agreed that the defendant, as agent for the plaintiff, should take out policies of insurance on the wool, and that the proper inference to be drawn from this, and from the course of business between the parties, is that the defendant was not to be liable for any loss covered by the policy of insurance. The Lord Chief Justice held that the insurance was made by the defendant on his own behalf; and, having looked at the reasons given for this conclusion, I agree entirely with them, and with the conclusion that no inference can be drawn of any stipulation to limit the defendant's liability. I also agree with the conclusion of the Lord Chief Justice, that had the insurance been effected by the defendant as agent that would not entitle the Court to draw the inference that the defendant's liability was to be limited. Even if the insurance had been effected on behalf of the plaintiff, it would give him an additional protection in case of loss, but he would not thereby lose his right to go against the defendant, and would be at liberty to sue either the defendant or the insurers."

A clause in carriage contracts, assuming to exclude liability for all insurable damage, does not release the carrier from damage due to negligence (*Carver, Car. by Sea*, 3d Ed., § 105; *The Hadji*, 20 Fed., 87).

In *Steele* v. *Buck*, 61 Ill., 343, a charter-party contained a clause that "the charterers should cause the vessel to be insured in the name of Buck (the owner) and that the charterers should pay 85% of

the premium," evidence was offered that there was such an insurance.

The Court, Scott, *J.*, page 35, said: "The mere fact that the vessel was insured for the benefit of the appellee would constitute no defense to the action." It was held that nothing short of proof of satisfaction of the loss would suffice, even under the form of the clause there involved.

The foregoing cases clearly show that, whatever may be the true office of the insurance clause, it does not make a person an insurer, merely because he has agreed to pay or bear the cost of an insurance.

All that appears with regard to the owner's insurance, in this case is that he "carried a line of insurance on the vessel against sea perils, including collisions, but not for the full value of the vessel, * * * being in part uninsured" (p. 38). It may fairly be inferred from the other evidence in the case that there was no insurance of the fourth quarter running-down risk, or of the claims for the personal injury and death.

If it be assumed, for the purpose of the argument, that such was the case, what would be the result? The insurance would cover everything which, according to the custom of insurance, as testified by Mr. Gourlie on his cross-examination, it could possibly be expected that the owner would have insured (*Gourlie*, pp. 70-75.) It would amount to a compliance with the shipowner's obligation on the most extended interpretation of the insurance clause for which the charterer could contend. The pinch would come on the question whether the charterer was entitled to the benefit of this insurance to the extent of defeating the right of subrogation of the shipowner's underwriters, who, if called on to pay, would have a cause of action against the charterer as the wrongdoer who caused the loss.

The bare fact that there was insurance would be of no advantage to the charterer unless he was en-

titled to the benefit of it, as between him and the owner, to the extent of foreclosing and completely cutting off the underwriters' subrogation.

It is remarked that where the charterer desired a *benefit*, under the charter party, he stipulated for it explicitly. Thus, in clause 23, which immediately follows the insurance clause, it is provided that: "The *benefit* of all derelicts and salvages * * * to be for account of owners and charterers equally." Moreover, at the end of clause 17, there is a provision which plainly implies that the owner's insurance is for his own account alone, and further that the charterer is understood to have some insurance in its own name and for its own account.

It was not stipulated that the charterers should be named as the assured in the shipowner's policy, and hence, of course, they could claim nothing under it directly (*Carroll* v. *Boston Marine Ins. Co.*, 8 Mass., 515). The underwriters have a right to have the owners prosecute the claim in these proceedings as against the charterer, by virtue of their right of subrogation (*Dufourcet* v. *Bishop*, 18 Q. B. D., 373). This right, on the part of the underwriters, cannot be cut off except by the most explicit provision in the contract between the owner and the charterer (*Mobile Railway* v. *Jurey*, 111 U. S., 584, 594, 595; *Clark* v. *Wilson*, 103 Mass., 219, 227; *North of England Assn.* v. *Armstrong*, L. R., 5 Q. B., 244; cf. *Inman* v. *So. Car. Ry.*, 129 U. S., 128).

There is no stipulation in the charter-party which, in terms, or by necessary implication, provides that the charterer shall have the benefit of the insurance effected by the owner (for the forms of such stipulations see *Holmes* v. *Montauk Steamship Company*, 93 Fed. Rep., 731, 733; *Phenix Ins. Co.* v. *Erie Railway*, 117 U. S., 312), or assumes to abridge or abrogate the underwriters' right of subrogation.

It would be against public policy to presume that such was the intention of the insurance clause; for,

as was said by MR. JUSTICE CURTIS, in *General Ins. Co.* v. *Sherwood*, 14 How., 351, 367-368:

"We cannot doubt that the knowledge by owners, masters and seamen, that underwriters were responsible for all the damage done by collision with other vessels through their negligence, would tend to relax their vigilance and materially enhance the perils, both to life and property, arising from this case."

V.

Even if it be assumed that, under clause 22, the owner was bound to provide, as well as to "pay for the insurance on the vessel," and to give the charterer the benefit of it, the charterer could not ask for the benefit of any insurance except "on the vessel" (Barnstable), and such insurance could not be offset against the owner's claim, in this proceeding, because the losses here involved would not be included in such an insurance.

1. The "insurance *on the vessel*," for which the owner was to pay, would not include insurance against "running-down risks," but would include only insurance against damage to the vessel insured, unless the import of the clause can be extended by reference to some settled practical construction of merchants and underwriters, under which it would necessarily include something additional.

The phrase "insurance *on the vessel*" is a technical expression found in all policies on ships, and has been construed by the Courts.

The ancient form of insurance by Lloyds' policy on a ship was in these very words: "Be it known that A. B. * * *

"doth make assurance and cause himself * * * "to be insured * * * *upon the body*, tackle, "apparel, ordnance, munition, artillery, boat and "other furniture *of and in good ship or vessel* "called the * * *" (*Gow Marine Insurance*, p. 29; *McArthur, Mar. Ins.*, 2d Ed., *pp.* 27, 28; 1 *Arnould, Mar. Ins.*, 3d Ed., 220; *Gourlie, p.* 69; *Petitioner's Exhibits* 17, 18). Those exhibits show that at the present day hull insurance is made "*on the vessel.*"

In *General Mutual Insurance Company* v. *Sherwood*, 14 Howard, 351, an effort was made to recover under a policy issued "*upon the brig Emily*" (p. 361), a loss of $8,000 which her owner had been compelled to pay for damage done by the *Emily* to another vessel. It was held that an insurance "upon the brig *Emily*" *did not cover damages which the brig might do to another vessel*, but only damage which came to the *Emily* herself.

The English law is to the same effect (1 *Arnould, Mar. Ins.* 3d Ed., 20, 21; 2 *do.*, 672, 673).

In *Tyser on Marine Insurance Losses* (London, 1894), the rule is stated as follows:

"§ 129.—The only effects of the perils insured against, for which the underwriter *on ship* is liable, are damage or loss of the ship, &c., insured. * * * A mere money loss, not arising from damage to the ship insured, *e. g.*, a payment to be made to an other ship for injury done to it in collision, is not a loss recoverable from the underwriter, in the absence of a collision clause (*De Vaux* v. *Salvador*, 4 Ad. & El., 420)."

In the present case, therefore, under those authorities, an insurance by the owner of the *Barnstable* "on the vessel" in the language of clause 22, would not have indemnified him against any part of the damages adjudged to be paid in this cause to the *Fortuna* and her crew.

Must it not be assumed that when the parties have embodied in their contract a printed form of a clause that has a clearly defined legal meaning, they intended to use the clause in its proper legal signification?

Both the Courts below appear to have followed the Massachusetts decisions as to the scope of the phrase "an insurance on the vessel." Under the doctrine of the Massachusetts Courts such an insurance covers not only damage to the vessel insured, but also that which the insured vessel causes to another by collision (*Nelson* v. *Suffolk Ins. Co.*, 3 *Cushing*, 477). Though the Courts sat in the State of Massachusetts, they were, nevertheless, bound to follow the decision of this Court in *General Mutual Ins. Co.* v. *Sherwood* (*supra*), and they erred in failing to do so.

2. If it be admissible to receive parol evidence of the meaning of an "insurance on the vessel," the testimony in the record is overwhelming to the effect that the words have no trade meaning that is different or more extended than their ordinary sense, as judicially defined.

In *Insurance Company* v. *Sherwood*, 14 How., 351 (at p. 362), Mr. Justice Curtis said:

"In examining *for the first time* any question under a policy of insurance, it is necessary to ascertain whether the contract has received *a practical construction by merchants and underwriters; not through any partial or local usages, but by the general consent of the mercantile world.* Such a practical construction, when clearly apparent, is of great weight, not only because the parties to the policy may be presumed to have contracted in reference to it, but because such a practice is very high evidence of the general convenience and substantial equity of it as a rule."

The evidence of Bennett was introduced by the charterer for the purpose of establishing a practical construction, to the effect that clause 22 imposed an *obligation* on the owner to insure against running down risks for the charterer's account.

His testimony, however, is extremely unsatisfactory. He first intimated that he had inserted the insurance clause in this particular charter-party, as a special provision (p. 41); but, after being shown the printed forms of all the other leading ship brokers in New York, he finally admitted that no change had been made in it, in adapting it into the form used by his firm (p. 62), which was shown by his partner, Hall, to have been drawn up, and in use, before Bennett joined the firm (pp. 78, 39). When asked by his counsel what was included in insurance "on the vessel," Bennet said: "Insurance *on the vessel* against stranding, collisions, &c., as usual" (p. 41); but even here he does not intimate that it would include damage done *to another* vessel. He further says that he told a *former* owner of the *Barnstable* at the execution of the charter-party that "he would have to insure for his vessel *the same as the charter-party stated*" (p. 42). The same thing was repeated later in his testimony (x-Q. 64, p. 44), with a little more elaboration, but still without any suggestion that the owner would need to insure against damages done to *another* vessel. He first pretended that he had had experience in settling losses under these policies (p. 45), but they seem to have been cases where the vessel *insured* had been damaged, and he finally admitted that the question had never come before him, as a practical matter; until this case arose (x-Qs. 86, 87: pp. 46, 47).

Mr. Hall, who for many years, and until after this accident, was Bennett's partner, and had been a partner in the firm before Bennett joined it, also testified that the adjustment of liabilities between owners and charterers on net forms, such as this, had never come up for practical determination before

the firm of Hurlbut & Co., during the time that he was with it (p. 78).

It is submitted that Bennett's evidence is wholly insufficient to show such a practical construction of this clause, "by merchants and underwriters, and by the general consent of the mercantile world" as would be required to give it a more extended construction than that which was put upon it in *Ins. Co.* v. *Sherwood* (*supra*), and to have it include an obligation by the owner to insure against running-down losses for the charterer's benefit.

But there is other evidence, on the same subject, showing that Bennett's opinion of the meaning of the clause is entirely individual, and is not supported by any usage or opinion of the general mercantile world.

Hall, a witness of twenty-five years' experience, testified (p. 78):

"Q. 16. Referring to clause 22, that the owners shall pay for the insurance on the vessel, has that clause any commercial or trade significance in any way from the ordinary meaning of the words? A. No.

Q. 18. Is there any commercial or trade understanding that the charter is to have any benefit of such insurance? A. None at all."

Herbert Barber, a witness of thirty-five years' experience, testified (p. 84):

"Q. 14. Is there any trade meaning or interpretation of that clause differing in any way from the ordinary meaning of the words? A. Not that I am aware of.

Q. 16. In the form in which you have it [the insurance clause], does the charterer by any common usage get any benefit of the owner's insurance? A. No, I don't think so. No.

Q. 20. And so far as your experience goes, there is no trade meaning or interpretation of the ordinary clause that the owner shall pay for the insurance of

the vessel differing in any way from the plain meaning of the words? A. Not that I am aware of."

Ramon G. Cadiz, a witness of twenty years' experience, testified (p. 76):

"Q. 15. Is there any customary or trade meaning to those words, 'the owner shall pay for the insurance on the vessel,' which differs in any way from the ordinary meaning of the words? A. None whatever. Just the literal sense in which the expression is made use of there."

On cross-examination Mr. Cadiz and Mr. Barber appeared to think that if the owner insured he should assume the risk of collisions (pp. 76, 85); but neither had ever known of an actual case where the point was involved or had come up for practical determination (pp. 77, 85).

Mr. Hall's evidence has already been referred to.

The evidence of Mr. Gourlie, to which the District Judge alluded, was far from showing any definite trade meaning of the phrase, differing from its adjudged legal meaning. The material part of his testimony on the subject is short, and may for convenience be quoted (p. 70):

x-Q. 21. So that when you speak of a policy of insurance on a vessel you would understand that to cover at least three-quarters of the running down? A. Well, no, answering that question, I don't think that I would. * * *

x-Q. 26. Where a charter-party provides that the owner shall pay the insurance on the vessel, would not that, in your opinion, include all insurance? A. No.

Page 71: x-Q. 30. Where the c .arter provides that the owner shall pay for the insurance on a vessel, would not that, in your opinion, include all insurance? A. No.

x-Q. 31. What would not be included? A. I do

not think that the four-quarters collision would be included in it.

x-Q. 32. That is, under that clause in the charter-party, in your opinion, the shipowner would insure against the loss of the vessel, and the charterer would insure against her running down? A. No; I didn't mean that, either.

x-Q. 33. Will you explain, then? A. Under that clause I should not expect that the owner of the vessel would insure against everything. For instance, I should not expect to find that he would insure against more than three quarters collision.

x-Q. 34. You would expect him to insure to the extent of three-quarters? A. Yes; that is my *feeling* on the subject.

Page 74: x-Q. 53. In the case of an English vessel, if I understand you, taking out insurance, you would expect that insurance to cover three-quarters of the running down? A. I would, if I was told that they were seeking full insurance.

x-Q. 54. Full insurance would imply, of course, insurance against running down as well as insurance against other loss? A. Full insurance would imply insuring three-quarters running down as well as other loss.

x-Q. 55. Simple insurance would imply that? A. No. *It would prompt an inquiry*, I think. If you ask me to procure insurance on your hull, and you told me the amount and her name, and her tonnage, and her voyages, and her valuation and all that, *I would have to ask you the question, 'Do you want the running down included?'*"

On this state of the evidence it cannot be said that the contract has received "a practical construction by merchants and underwriters, not through any partial or local usages, but by the general consent of the mercantile world," under which the phrase "insurance on the vessel" can be said to include anything more than it was held to include in the case of the *Insurance Company* v. *Sherwood*,

namely, insurance against damage to the *Barnstable* herself.

3. Insurance against running-down risks is not properly described as an insurance "on the vessel."

It is generally a "rider," though sometimes a separate policy, but in either case, is not included in the hull policy, and is not to be an insurance "on the vessel" (1 *Arnould, Mar. Ins.*, 3d Ed., 20, 21; 2 *do.*, 672, 673). Mr. Gourlie gave the substance of the form of the clause in his evidence (p. 72).

It is set out in full in *McArthur on Marine Insurance* (2d Ed.), p. 372, as follows:

"And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum or sums of money not exceeding the value of the ship hereby assured, we will severally pay the assured such proportion of *three-fourths* of the sum so paid as our respective subscriptions hereto bear to the value of the ship hereby assured; and in cases where the liability of the ship has been contested with our consent in writing, we will also pay a like proportion of three-fourth parts of the costs thereby incurred, or paid; *provided* also, that *this clause shall in no case extend to any sum which the insured may become liable to pay, or shall pay, in respect of loss of life or personal injury* to individuals for any cause whatsoever."

See also numerous forms of the clause in McArthur, Appendix III. (pp. 372-378); 1 *Arnould*, pp. 238, 239.

This is no more properly to be described as an "insurance on the vessel" than would be an employer's liability policy, taken out against liability

for personal injuries to those on board the vessel, which it is seen, is always expressly excluded from the indemnity provided by the running-down clause.

The Court should not have been astute to find a meaning in the insurance clause which would oblige the owner to insure against the misconduct or neglect in navigation of the servants of the charterer (*General Ins. Co.* v. *Sherwood*, 14 How., 351, 367–368).

It was open to the charterer to insure against such risks. If it has not done so, it will be assumed that it intended to bear them, unless it can point to some clear provision in the charter, by which the risks were devolved on the owner. The burden of proof to show a devolution of the risk must rest with the charterer. A finding that the risk had been shifted should not be made except on very clear proof. The law regards with disfavor a stipulation that one party shall insure against another's misconduct and give to that other the benefit of the insurance (The *Hadji*, 22 Blatchf., 235, 238).

4. The evidence did not warrant the conclusion reached by the Court below, that the charterer was entitled to the benefit of the shipowner's insurance in any amount.

a. The shipowner's insurance was taken out for his own protection only. It is to be borne in mind that both the shipowner and the charterer had insurable interests. The shipowner had his own investment at stake, which was liable to be lost by perils for which neither party to the contract would be liable, *e. g.*, perils of the sea. He might also wish to insure the solvency of the charterer, in case the latter, by its faults, imposed liens on the ship which it could not discharge. Because the law attaches a primary liability to the ship for a collision loss to another ship, the owner also had an insurable interest in that risk, which

would not be affected by the fact that the charterer also had an insurable interest in it. The owner's insurable interest in such risk would not be taken away by the fact that he had a right of indemnity against the charterer; for a charterer might prove to be insolvent (1 *Arnould Mar. Ins.*, 3d Ed., 53). The subrogation of underwriters must also be considered.

The mere fact, therefore, that the Turret Steamshipping Company "carried a line of insurance on the vessel against sea perils, including collisions, but not for the full value of the vessel, the owner being in part uninsured," as is stated in the stipulation (subject to the objections reserved, and which were renewed and pressed in both courts below), does not tend in any way to establish a practical construction of clause 22 by the parties to the effect alleged by the charterer. It does not necessarily imply anything more than that the owner intended to protect his own interests.

Much less does it tend to show a mutual intention that the charterer should have the benefit of the owner's insurance. The Court, nevertheless, went to the length of holding that the charterer should have the benefit of all the shipowner's insurance, and further penalized it in the sum for which it was uninsured under marine policies, and also for the personal injury risks which were not insurable under a marine policy, even with a running-down clause attached (*Gourlie*, p. 72, Q. 40), but could only be insured under an accident policy.

The District Judge seems to have regarded the shipowner and the charterer as engaged in a joint enterprise, and to have considered that the owner's insurance was for joint account. For example (p. 95), he says: "The phrase seems broad enough to include insurance of every kind that in the expectation of the parties properly appertained to their *joint enterprise*" (p. 94). "In reply to this criticism, it may be said that the owner's argument involves the fallacy of a shifting of premises and of treating the

insurance, first, as relating to the vessel and *to the joint enterprise of owner and charterer*," &c.

The District Judge certainly misconstrued the petitioner's argument and brief, if he understood that it was ever suggested that the parties were engaged in a joint enterprise. It was not so stated in the brief.

In point of fact there was nothing *joint* about the enterprise, any more than there would be a joint enterprise between landlord and tenant, under a lease which provided that the landlord should pay certain expenses in respect of the premises, and the tenant should pay others.

The enterprise of the shipower was limited strictly to furnishing the ship, and keeping it in order for use, in order to earn the rent for its service. It was of no interest to him whether the charterer actually made any use of the vessel by carrying cargoes or not. The use of the vessel in its business of importing fruit was the enterprise of the charterer exclusively.

The assumption that the parties were engaged in a joint enterprise really lies at the base of much of the Judge's opinion. For example, he argues that because the charter party specified certain charges to be borne by the charterer, and certain by the shipowner, that " it must follow that both should share in all benefits accruing from the payment of fixed charges upon the vessel " (p. 95).

Surely this cannot be law. If it is, then the shipowner ought to share in the profits which accrued from the importation of the charterer's fruit. The shipowner obtained no benefit from the mere navigation of the ship, as the hire was payable whether the ship was navigated or not. It therefore gained no direct benefit from the payment by the charterer of the charges it assumed, all which were incidental to the use of the ship as an instrument of commerce, unless it is still entitled under the mutual benefit theory to some of the fruit profits.

b. It is next to impossible, and not at all reasonable, to spell out of the words used, a mutual intention that the charterer should have the benefit of the insurance obtained and paid for by the owner. There is nothing in the charter-party which necessarily implies it.

In another relation (Clause 23) the charterer *did* stipulate for a benefit, expressly; and under an implication which arises from the concluding sentence of clause 17, it appears to have been understood that each party would insure its own risks, irrespective of insurance by the other.

The evidence of the witnesses is conclusive to the effect that there is no custom under which the charterer should have the benefit of the owner's insurance.

Hall testified:

(P. 78, Q. 18.) Is there any commercial or trade understanding that the charterer is to have any benefit of such insurance? A. None at all.

(P. 79.) Q. 26. Is there a well known clause in charter-parties to meet the case of an owner insuring for the benefit of a charterer if the charterer desires or requires it? A. I have seen such clauses.

Q. 32. Have you chartered any vessels on different forms in which the insurance clause was different. I mean to ask you about the Pirate and the Kenilworth? A. Those are the only two boats that I remember.

Q. 33. How about the insurance clause there, if you remember? A. The printing of it?

Q. 34. No, the way it was. A. If I remember rightly, it specially stipulated that the boats were to be kept insured, and that any damage done to the vessel over one hundred and twenty pounds, which was not covered by the policy; but any damage over one hundred and twenty pounds recovered under the insurance policy, the charterers were to have the benefit of the insurance.

Q. 35. And how about the one hundred and twenty pounds? A. If the damage did not amount to that, then the charterers had to pay for the damage."

The witness further testified (Q. 40) that he was acquainted with the firm of Frank C. Strick & Company, of London, Swansea, Cardiff and Newport, England, and had seen clauses similar to that embodied in their form (*Petitioner's Charter, Exhibit* 15). That clause is quoted in the opinion of the Court (p. 93) and reads:

"The owners * * * shall pay for insurance on the vessel *against all risks*, including protection and indemnity, and freight and demurrage club protection, *giving charterers full benefit of the same*, as if they were for the time being owners of the ship."

Herbert Barber (p. 84, Q. 16) testified:

"In the form in which you have it (clause in his form of charter was in the same words as the clause here in question), does the charterer, by any common usage, get any benefit of the owner's insurance? A. No, I don't think so.

"Q. 17. Now, if the charterer desires the benefit of the owner's insurance, is there a provision for that made? A. In some charters it is made.

(P. 85.) "x-Q. 21. That is, if I understand you, Mr. Barber, where the owner agrees to pay for the insurance he has the benefit of the insurance? A. That is so; yes.

"x Q. 22. And if the charterer is to have any interest in that insurance it must be so provided expressly? A. That is my understanding of it; yes."

Bennett testified (p. 48):

"I have never seen a charter pass through our office or any other office in which a charterer insured the vessel *or got any benefits from insuring*

the vessel whether made by the owners or anybody else.

"(P. 50.) x-Q 111. Have you ever seen, in your experience, a charter-party in which these words occurred: 'Charterers to have the benefit of the insurance?' A. I never have. As a rule, the owners are given no benefit.

"x-Q. 112. Have you ever seen a charter in which there were any words similar to those? A. Not to my knowledge, in which the charterer has got any benefit at all from the insurance."

Notwithstanding this evidence, the District Judge seems to have found, that Clause 22 of this charter-party, which provides "that the owner shall pay for the insurance on the vessel," was as broad, included the same subjects, and gave the charterer the same benefits as the clause in Strick & Company's charter above quoted (p. 96).

This finding seems, on the difference of language used in the two clauses, to be clearly incorrect. An insurance "on the vessel," is not the same thing as an insurance on the vessel against "*all risks* including protection and indemnity and freight and demurrage club protection."

"Protection and Indemnity, Freight and Demurrage Club risks," are not insurance, in any proper sense (1 *Arnould Mar. Ins.*, 3d Ed., 139; *Harvey* v. *Beckwith*, 12 W. R., 819, 896).

In the *Titania*, 19 Fed., 101, where the bill of lading provided that the shipowner should "not be liable for any damage to goods capable of being covered by insurance," it was held (p. 104) that the clause "cannot reasonably be construed as intended to mean any possible insurance and upon any possible insurance. It must be held to refer only to insurance which might be obtained in the usual course of business from the ordinary insurance companies." It was held not to have reference to Protection Club indemnities.

There is absolutely nothing in clause 22 that is equivalent to the express provision in Strick's

charter, which gives "charterer's full benefit of same, [insurance], as if they were for the time being owners of the ship."

It is too great a stretch on language to hold that the two clauses are equivalent. One would cut off the right of subrogation, while the other would not.

The Court should have found that neither the words of the clause in this charter party, nor the evidence in the case, implied that the Fruit Company should have the benefit of the owner's insurance.

If such a result was desired, the charterer should have inserted the clause, which is commonly adopted to achieve it, and which it *did* use in clause 23. Common carriers often stipulate that, in case of claims for damage, they shall have the benefit of the shipper's insurance on goods; but in such cases the intention is made clear, as, for example: "The carriers [if] liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods" (*Phœnix Ins. Co.* v. *Erie, &c.*, 117 U. S., 312; The *Hadji*, 20 Fed., 875; 22 Blatch., 235; *Rintoul* v. *N. Y. Central Ry.*, 21 Blatchf., 439; the *Sidney*, 23 Fed., 88). In the absence of such a clause here, it must be inferred that there was no common intention that the charterer should have the benefit of the owner's insurance to cover the consequences of the charterer's neglect.

VI.

If the insurance clause is susceptible of a construction that required the owner to insure against damage which the Barnstable might do to another vessel, owing to the charterer's faults, and to give the charterer the benefit of

such insurance, the obligation would extend only to the usual three-quarters of the running-down risk. The Court erred in refusing to hold that the remaining quarter would have to be borne by the charterer.

•

The import of clause 22, if extended by reference to custom and usage, must also be confined by the limitations of the usage.

If Mr. Gourlie's evidence amounts to proof of a custom for shipowners to insure "on the vessel" a certain amount on the running-down risk, it is very clear to the effect that the usage is not to insure more than three-quarters on that head (pp. 70-75).

Lloyd's form of rider, to cover this risk, has, in the print, the words "three-quarters" (*Gourlie*, p. 73; *McArthur Mar. Ins.*, 2d Ed., 325; 1 *Arnould, Mar. Ins.*, 3d Ed., 238, 239), and in every one of a large number of such clauses, collected in *McArthur's Mar. Ins*, App. III. (pp. 372-378), the words "three-fourths" appear.

The risk of the fourth fourth is commonly protected, if at all, in Mutual Protecting Clubs, in which the owner is in part his own indemnitor (*McArthur*, p. 325; cf. *London S. S. Owners Mutual Assn.* v. *Grampian Co.*, 24 Q. B. D., 32; 1 *Arnould*, 139).

This is not a form of "insurance on the vessel." Such clubs do not even issue a policy (1 *Arnould*, 139).

Gow, Marine Insurance, ends his discussion of the running down clause, as follows (p. 253):

"The running down clause discussed above deals with *only three-quarters* of the shipowner's liabilities; *in a few cases*, underwriters have consented to extend the provisions of the clause to cover the whole of the assured's liabilities arising out of damage done to property by the collision of the insured ship with another ship or vessel. The clause thus

extended is known as the 'four-fourths' running down clause." But, even as thus extended, it would still remain with the proviso "That this clause shall in no case extend to any sum which the assured may become liable to pay or shall pay * * * for loss of life or personal injury" (*Gow*, p. 252).

No part of this runnning risk would be covered by the insurance clause as construed in *Genl. Ins. Co.* v. *Sherwood*, 14 How., 351. If any part of it should have been covered, "on the vessel," for the charterer's benefit, under some established usage, it is plain that the usage would not imply an insurance of more than three-fourths of the collision risk (*Gourlie*, pp. 70-75). Resort to usage, therefore, would leave the charterer to bear one-fourth of the collision damages, or $3,643 (p. 36); and for the error of the Court below in failing to charge it with that amount, because of its fault, the decree should be reversed.

VII.

The Court below erred in holding, that, under the most extended construction of which clause 22 is capable, the owner was bound to insure the charterer against claims for personal injuries to persons on board another vessel, or for the death of such persons, caused by the faults of the charterer in navigating the insured vessel.

These classes of risks are not insurable under any known form of marine policy on a vessel (1 *Arnould, Mar. Ins.*, 3d Ed., pp. 20, 21; 2 *do.*, p. 673). Plainly they are not insurable under the Lloyds' form of collision clause (*Gourlie*, pp. 69, 72), or under any of the forms that are quoted in the books on marine insurance (*McArthur, Marine Ins.*, 2d Ed., pp. 325,

372); 1 *Arnould on Ins.*, p. 238). The charterer has not produced to the Court any form of policy under which these classes of losses could have been covered. Surely it cannot be inferred that the parties intended that the owner was to insure these risks under some form of accident policy; for such a policy would not be an "insurance on the vessel" in the sense of the charter-party. Yet apparently they would have to be insured in that way, if at all.

The damages on these classes of claims amount, without interest, to $4,900 (p. 36). Clear error was committed by the Court below in failing to hold that these damages, at least, should be charged to the charterer; and for this error alone, if for no other reason, its decree should be reversed.

Last Point.

The decree appealed from should be reversed, with costs, and the cause remanded, with instructions to enter a decree adjudging that the Boston Fruit Company pay all the damages due to the libelants and intervenors, and that the Turret Steam Shipping Company have judgment against the Boston Fruit Company for any sum that it may be compelled to pay under decrees in rem against the Barnstable.

March 6, 1901.

Respectfully submitted,
CONVERS & KIRLIN,
Proctors for the Turret Steam
Shipping Co., Ltd.

J. PARKER KIRLIN,
Advocate.

No. 178

Supreme Court of the United States.

Filed Jan. 8, 1900

TURRETT STEAM SHIPPING COMPANY, LIMITED,

CLAIMANT OF STEAMSHIP "BARNSTABLE,"

Petitioner for Writ of Certiorari,

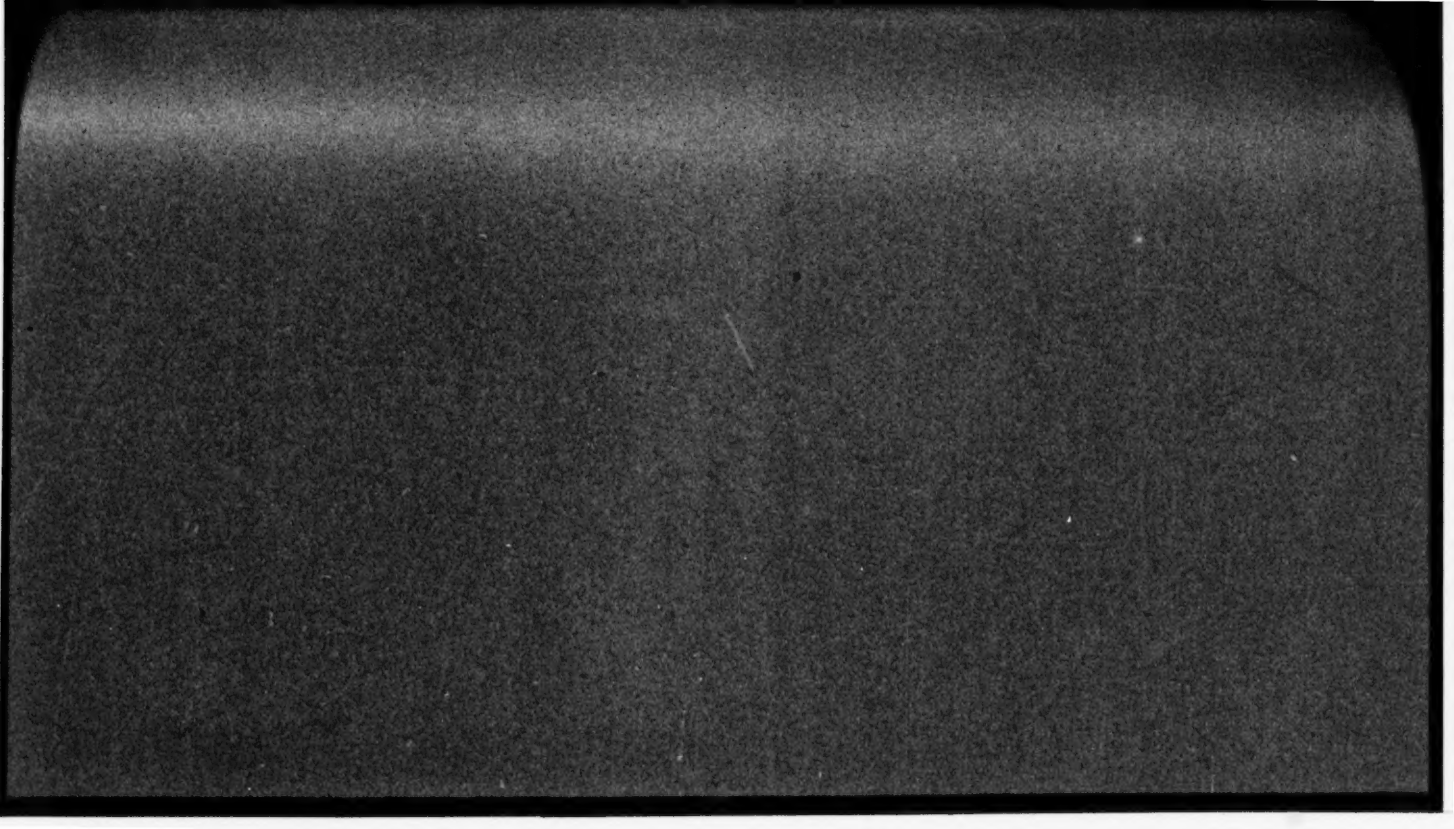
v.

THE BOSTON FRUIT COMPANY.

ANSWER TO PETITION.

CHAS. THEO. RUSSELL,
ARTHUR H. RUSSELL,
Counsel for Respondent.

BOSTON:
NATHAN SAWYER & SON, PRINTERS.
1900.



Supreme Court of the United States.

TURRETT STEAM SHIPPING COMPANY, LIMITED, CLAIMANT OF STEAMSHIP "BARNSTABLE," *Appellant, Petitioner*,

v.

A. S. HALL, ET AL., OWNERS OF SCHOONER "FORTUNA," AND PETITIONERS, AND

v.

THE BOSTON FRUIT COMPANY, *Respondent, Appellee.*

ANSWER OF THE BOSTON FRUIT COMPANY TO THE PETITION FOR CERTIORARI.

The Boston Fruit Company, the respondent to the petition for *certiorari*, respectfully answers and alleges as follows: —

First. It appears from the record submitted that Hall and others, as owners of the schooner "Fortuna," and certain intervening representatives of seamen on board, filed a libel in admiralty in the United States District Court for Massachusetts January 15, 1896, against the steamship "Barnstable," for running down and sinking the schooner off Cape Cod, about six o'clock P.M., January 13, 1896 (Record, pp. 2–4). The master of the steamship, "as agent of the owners," filed the claim for the steamship (Record, p. 5), and as master and such agent gave stipulation with sureties to respond (*Id.*). Upon April 8, 1896, upon petition and representation, the Turrett Steam Shipping Company as owner was substituted for the master as claimant;

and upon the same day the Boston Fruit Company, upon petition of the ship owner (Record, pp. 9–13), was summoned to answer under Admiralty Rule 59 as the charterer in possession and manager of the steamship. Answer to the merits was subsequently filed by the owner of the steamship (Record, pp. 22–25), and answer to the petition of the steamship owner was filed by the Boston Fruit Company (Record, pp. 25–27.) It was subsequently agreed by all parties in interest that the collision was caused wholly by the fault and neglect of those in charge of the navigation of the steamship, and the amount of damages was also agreed. (Agreement for damages, Record, p. 35, Stipulation regarding Facts, *Id.*, p. 37). Under these agreements it was admitted that libellants were entitled to a decree for the agreed damages against the steamship. The only question open for litigation was the petition of the steamship owner under Admiralty Rule 59 (Record, p. 9) that the Boston Fruit Company as charterer be declared primarily liable for the damage, under and by virtue of the contract of charter between the ship owner and said fruit company.

Second. The question of the liability of the Boston Fruit Company under Admiralty Rule 59 was argued upon agreed facts, with certain evidence regarding the making of the charter party and the usage in regard to its construction (Agreed Facts, Record, p. 37; Evidence, Record pp. 39–85). The charter party upon which the petitioner must rely to impose liability upon the Boston Fruit Company is printed in the Record (pp. 14–18). The case was fully and ably argued by the learned counsel for the ship owner in the United States District Court for Massachusetts (Judge BROWN, of Rhode Island, sitting), and it is apparent, from his elaborate opinion that the question involved was appreciated by the Court and the case fully considered. The opinion is in the Record (pp. 90–99), and is also reported.

The "Barnstable," 84 Fed. Rep. 895.

20838

Third. The Turrett Steam Shipping Company, not content with the decision dismissing its petition, exercised its right of appeal to the United States Circuit Court of Appeals upon assignments of error printed in the Record (pp. 87–90). The case was again argued at length in the Circuit Court of Appeals for the First Circuit before Judges PUTNAM, WEBB, and ALDRICH, and May 11, 1899, the decree below was unanimously affirmed with an opinion by Judge WEBB (Record, pp. 103, 104).

Also —

The "Barnstable," 94 Fed. Rep. 213.

The petitioner has therefore submitted the question of charterer's liability under the peculiar contract to two tribunals, has had the unanimous decision of four learned judges against its contention, and has exhausted every right of trial recognized in the Federal Practice.

Fourth. The appeal by the present petition is, to the discretion of this Court, to keep the litigation open; to leave unpaid an admittedly just debt to the owners of the sunken schooner, to the sailors injured and the representatives of sailors killed by the collision; and to hear argued, consider and decide what is at most a question of construction of an admittedly peculiar contract of charter between the petitioning ship owner and the respondent charterer.

Fifth. No general principle of law or of charter party construction is involved in this case. It is submitted that this Court has laid down the rules of construction and applied them in so many cases that argument and decision in this case will involve only labor to Court and counsel and expense and delay to litigants, with no commensurate advantage in declaring or

affirming any of the well-recognized rules of construction. This case involves no legal question of general importance or application not already settled.

See —

U. S. *v.* Shea, 152 U. S. 178.
Leary *v.* United States, 14 Wall. 607.
Reed *v.* United States, 11 Id. 591.
Marcardia *v.* Ins. Co., 8 Cranch. 39.
Hooe *v.* Groverman, 1 Id. 214.
Gracie *v.* Palmer, 8 Wheat. 605.

Sixth. The contention of the respondent, in regard to the legal meaning and construction of the contract in this case, is so fully and ably stated and considered in the opinions of the Courts below, especially in the elaborate opinion of Judge BROWN, in the United States District Court, that it does not seem to the respondent necessary to repeat at this stage of the litigation the argument submitted in its behalf.

Wherefore the Boston Fruit Company prays this Honorable Court to dismiss the petition for the writ of *certiorari* with costs.

BOSTON FRUIT COMPANY.

BY ITS PROCTORS

CHAS. THEO. RUSSELL.
ARTHUR H. RUSSELL.

No. 178.

In the Supreme Co

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Russell v. Russell Le Roy

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...Supreme Court U. S.

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JAN 15 1901

JAMES H. KIERNEY,
Clerk.

...Jan. 15, 1901.

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...AMSHIPPING COMPANY, Ltd.,

...TEAMSHIP "BARNSTABLE," PETITIONER.

v.

...L ET AL., OWNERS OF THE LATE

...SCHOONER "FORTUNA."

AND

...STON FRUIT COMPANY,

...SPONDENT TO PETITION.

BOSTON FRUIT COMPANY.

...AS. THEO. RUSSELL,

...THUR H. RUSSELL,

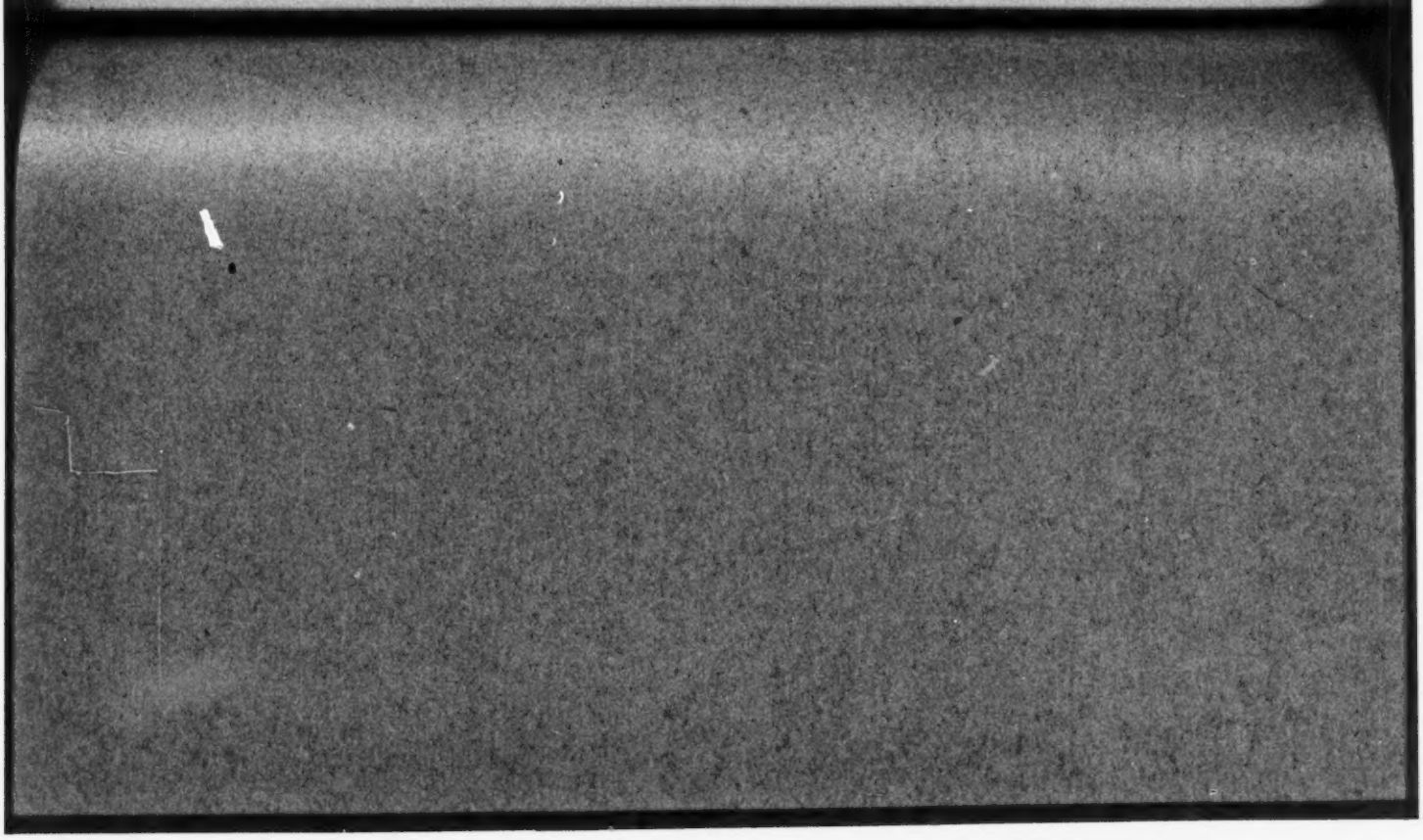
Counsel.

BOSTON:

...AM SAWYER & SON, PRINTERS,

...ast Printing House, No. 42 Lincoln Street.

1901.



20840

Supreme Court of the United States.

No. 484. October Term, 1899.

THE "BARNSTABLE,"
TURRET STEAMSHIPPING COMPANY, Ltd., Claimant,
Petitioner, Appellant,

v.

A. G. HALL et al., Libellants,

AND

BOSTON FRUIT COMPANY, Respondent, Appellee.

BRIEF FOR BOSTON FRUIT COMPANY.

Statement of the Case.

It is admitted that the only connection the respondent, the Boston Fruit Company, has with this litigation in tort for a collision loss, arises from a contract relation to the owner of the steamship "Barnstable," created by a charter party, to which reference will be made, and the construction of which is the question at issue.

The Record shows that the libellants' fishing schooner "Fortuna," while bound out upon a fishing voyage and off Cape Cod, was run down and sunk January 13, 1896, by the steamship "Barnstable" on a fruit voyage from Jamaica to Boston. The circumstances of the collision are not now material, as all parties have agreed that the collision "was caused by the

fault and neglect of those in charge of the navigation of the steamship 'Barnstable' at the time," without neglect or fault upon the part of the schooner.

Stipulation regarding Facts, Art. I., Record, p. 37.

The damages are also agreed, in the aggregate, $19,475, and a decree against the steamship entered for that amount and interest and costs.

Agreement for Damages, Record, pp. 35, 36.
Decree, *Id.*, p. 86.

The history and form of the litigation may have significance. Upon January 15, 1896, the owners of the schooner filed a libel for collision in the usual form against "the British steamship 'Barnstable' . . . her engines, boats, tackle, apparel, and furniture, and against all persons lawfully intervening therein in a cause of collision," etc.

Libel, Record, pp. 2–4.

Upon the filing of the libel, the master of the steamship, Captain Paine, filed a claim stating "that he is the master of the steamship 'Barnstable,' and that *as such master he is the agent of the owners and entitled to her possession*," and prays for delivery to him.

Claim, Record, pp. 4, 5.

Upon the same day, January 15, 1896, he stipulates for costs and to respond to any decree for damages, representing himself

in both stipulations as "*master of said steamship, and as agent of the owners, claimant*," and producing acceptable sureties.

Stipulations, Record, p. 5.

Upon February 20, 1896, one Nunan, a seaman injured in the collision, petitioned to join in the libel "against said steamship," etc., and was allowed to do so.

Nunan, Petition, Record, p. 6.

There was no further proceeding of record until April 8, 1896, when Mr. Kirlin filed an affidavit claiming that the "Barnstable" "was running under a demise charter to the Boston Fruit Company," and expressing an intention of the owner to summon such charterer "as a party that ought to be proceeded against in the present suit for the damage alleged," and praying that the ship-owner be substituted for and in place of the master as claimant of the steamship.

Affidavit and Order, Record, pp. 7–9.

Upon the same day the proctors for the ship-owner filed a petition reciting the litigation, alleging the charter party to the Boston Fruit Company; and, while denying fault in the navigation of the steamship, claimed that if there was negligence on the part of those in charge of the navigation of the steamship, "the persons thus charged with fault were the agents and servants of the Boston Fruit Company," and prayed "that said charterer may be brought in as a party under Admiralty Rule 59, and may be proceeded against in the same suit for such damages, for the reason that if said collision was caused or contributed to by any fault on the part of those in charge of the 'Barnstable,' such fault is ascribable to said Boston Fruit Company and its

servants, and not to said vessel herself, nor to your petitioner as the owner thereof."

Petition, Record, pp. 9–13.

The charter party relied upon in the petition is "Exhibit C."

Record, pp. 14–18.

After the filing of the petition, certain seamen upon the schooner, or their representatives (Emernan *et al.*, November 2, 1896, and Stewart, March 22, 1897), filed intervening petitions, reciting, among other things, the petition of the ship-owner against the Boston Fruit Company, and asking to amend the libel so as to include the Boston Fruit Company as a party respondent. No order amending the libel was made.

Emernan, Petition, Record, pp. 19–21.
Stewart, Petition, *Id.*, pp. 29, 30.

The Boston Fruit Company answered November 6, 1896, admitting the charter party, but denying liability under it for the alleged negligence and loss.

Answer, Record, pp. 25–27.

The agreement of facts filed May 12, 1897, admitted that the collision was owing to the fault and neglect of those in charge of the navigation of the "Barnstable" at the time, but not of the engineer, and was not caused or contributed to by the schooner (*Article first*); that the master, officers, engineers, firemen, and crew of the "Barnstable," at the time, had been appointed by the Boston Fruit Company, and were paid by it under and

pursuant to the charter party (*Article second*); that the "Barnstable" had been engaged under the charter party for more than six months before the collision (*Article third*); that no complaint was ever made by either party under clause 11 of the charter party (*Article fourth*); that there was no compulsory pilot on the steamship at the time (*Article fifth*); that the collision was caused by the negligence of the master, mates, or crew at the time in charge of the navigation of the steamship (*Article sixth*); that the master, mate, engineers, firemen, and crew appointed as provided in said charter party were the only persons at the time in charge of the navigation of said steamship, and responsible therefor (*Article seventh*); that (if the fact is material and competent) the Boston Fruit Company had no insurance upon the steamship, and the petitioner ship-owner carried a line of insurance on the vessel against sea perils, including collisions, but not for the full value of the vessel, the owner being in part uninsured (*Article eighth*).

Stipulation regarding Facts, Record, pp. 37, 38.

After argument, the United States District Court (Judge Brown) ordered a decree for libellants for the agreed damages against the steamship "Barnstable," and dismissed the petition of the ship-owner against the Boston Fruit Company, for the reasons stated in the opinion of the Court.

Final Decree, Record, p. 86.
Opinion of the Court, *Id.*, pp. 90–99.

Reported, —

Hall v. *SS.* "*Barnstable*," 84 Fed. Rep. 895.

The petitioner appealed to the Circuit Court of Appeals for the First Circuit, and that Court (Judges PUTNAM, WEBB, and ALDRICH sitting) affirmed the decree of the District Court dismissing the petition in an opinion by Judge WEBB.

Opinion, Record, pp. 103, 104.

Reported, —

The "Barnstable," 94 Fed. Rep. 213.

The case upon the same facts and issues presented, argued, and decided in the two lower Courts is before this Court by grant of petitioner's application for writ of certiorari.

ISSUE IN THE CASE.

As the Court, upon the agreement that the persons navigating the steamship were in fault for the collision, and that the damages were as agreed, found for the libellants against the steamship *in rem*, exonerating the Boston Fruit Company as charterer from liability to the libellants, and, as the libellants have taken no appeal, the sole issue is upon the petition of the ship-owner and the answer thereto of the Boston Fruit Company.

The libellants and intervenors by petition in the original libel have no present standing upon any claim against the Boston Fruit Company.

1. They have taken no appeal from the decree of the United States District Court, and are therefore bound by it.

2. In the intervening petitions of Emernan and Stewart (Record, p. 19; *Id.*, p. 29), under the admiralty practice, proceeding *in personam* against the charterer could not be joined

with the proceeding *in rem* against the steamship. The remedy is confined by Admiralty Rule 15 to a proceeding "against the ship and master, or against the ship alone, or against the master or the owner alone *in personam*."

Newell v. *Norton*, 3 Wall. 257.
The "*Atlantic & Ogdensburgh*," 1 Newb. 139.
"*Clatsop Chief*," 7 Sawyer, 274.
"*Zodiac*," 5 Fed. Rep. 220.

3. The attempt in these subordinate intervening petitions in behalf of the crew to join the charterer as respondent in the *in rem* libel against the steamship makes merely surplusage, presumably done *ex majore cautila* after the filing of the petition of the ship-owner against the charterer, with the expectation of allowance of a discontinuance against either after decision regarding liability. It is certain that none of the libellants can change the relation of ship-owner to charterer, or enlarge or lessen the mutual liability of either to the other under an express contract between them, by making allegations in the libel or petitions, or by the joinder of parties respondent.

The sole existing issue, then, is between the Turret Steamshipping Company, as owner of the libelled *res*, and the Boston Fruit Company, as the charterer, under the petition of the former filed under the 59th Admiralty Rule.

Should the decree of liability run solely, as decided by the courts below, against the steamship, or should it provide for a primary liability of the charterer, with recovery over against the steamship in case the charterer fails to respond to the decree?

ARGUMENT FOR BOSTON FRUIT COMPANY.

The Presumptive Liability is upon the Steamship.

It is admitted that the steamship is liable *in rem*, as the offending *res* to the libellants, regardless of ownership, lease, charter, or use.

1. The vessel guilty of fault for collision is treated in the admiralty as herself, sufficiently animate and reponsible to respond in damages. Upon this theory alone our admiralty procedure is founded, and the law of maritime lien and right of seizure justified.

"A ship is the most living of inanimate things. Servants sometimes say 'she' of a clock, but every one gives a gender to vessels. And we need not be surprised, therefore, to find a mode of dealing which has shown such extraordinary vitality in the criminal law applied with even more striking thoroughness in the admiralty. It is only by supposing the ship to have been treated as if endowed with personality that the arbitrary seeming peculiarities of the maritime law can be made intelligible, and on that supposition they at once become consistent and logical."

Holmes, Common Law, pp. 26–30.

Chief Justice Marshall in *U.S.* v. *Schn.* "*Little Charles*," 1 Brock. 347, 354, said: "This is not a proceeding against the owner; it is a proceeding against the vessel for an offence committed by the vessel, which is not the less an offence, and does not the less subject her to forfeiture because it was committed without the authority and against the will of the owner. It is true that inanimate matter can commit no offence. But this

body is animate and put in action by the crew, who are guided by the master."

Said Mr. Justice STORY in *U.S.* v. *Brig "Malek Adhel,"* 2 How. 210:—

"The ship is also by the general maritime law held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a wilful disregard of duty, as, for example, in cases of collision and other wrongs done upon the high seas or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of that law, which looks to the instrument itself, used as the means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party."

So, in the case of the "*China*," 7 Wall. 53, the fact that the collision was owing to the fault of a pilot compulsorily employed did not excuse the ship in the *in rem* proceeding.

"If charterers are owners for the voyage and appoint the master and crew, the ship is still liable. If she were navigated by pirates who had run away with her, she would, in my opinion, be responsible to the injured vessel." (LOWELL, J.)

The "Arturo," 6 Fed. Rep. 308, 313.

And see

The "Atlas," 93 U.S. 302.
"*Siren*," 7 Wall. 152.
"*Ticonderoga*," Swabey, 215.
"*Leamington*," 2 Asp. Mar. Law Cas. 475.

2. The only connection of the Boston Fruit Company with this litigation is invoked under the operation of Admiralty Rule 59, promulgated March 26, 1883 (112 U.S. 743), allowing the claimant of a libelled vessel upon petition to have process against another vessel or party claimed to have been in fault.

The object of this rule is stated by this Court

In re N.Y., etc., SS. Co., 155 U.S. 523.

"This rule provided for procedure through which, in a suit against one vessel for damage by collision, process might be issued in the same suit against any other vessel charged with contributing to the same collision or any other party, and for proceedings thereon" (p. 528).

And see

The "Alert," 41 Fed. Rep. 836.
"Hudson," 15 *Id.* 162.

The 59th Admiralty Rule, like all the Admiralty Rules of the Court, necessarily relates and is confined to form of remedy. It can not and does not impose liabilities, or change the legal or equitable rights of parties brought under it into one litigation. Its operation is limited merely to procedure.

U.S. Rev. Sts., sect. 913.

3. The issue upon this appeal is confined to the contractual relation of the ship-owner to the charterer, and this necessarily depends entirely upon the terms of the contract between them. There is no question here of possible personal liability of the charterer to the libellants, because (1) the libellants cannot proceed against charterer jointly in libel against vessel (15th Admiralty Rule); (2) they have not attempted to do so in the original libel which is the basis of the litigation; and (3) they have not appealed from and are therefore bound by the decree of the district court relieving the charterer from liability for the collision.

The case is to be distinguished from cases where charterers have assumed such control over or such relations to a vessel that they in legal effect hold themselves out to outside third parties as liable for damage done by the vessel or agents and are directly sued by such third party.

As under the law of partnership or agency there may be one liability to a third party, and a very different degree of liability to the co-partner or principal, the extent of the liability to the latter depends upon the exact agreement between the parties, and not upon what the outside world may have the right to infer from acts or representations in dealing with the partner or agent.

4. The case then is one in which the libellants as the injured party have recovered against the vessel as the injuring *res*, judgment from which no appeal has been taken by them. The owner of the *res* claims that the charterer is liable, and seeks recovery over against it precisely as though the ship-owner had paid the libellants and was seeking indemnity. The burden is upon the ship-owner to establish this liability to him. The presumption is, that, as the vessel is the offending *res*, her owner is her representative to respond to the maritime lien existing upon his property.

Joyce v. *Capel*, 8 C. & P. 370.
Hibbs v. *Ross*, L. R., 1 Q. B. 534.
Fraser v. *Cuthberson*, 6 Q. B. D. 93.
Chasteauneuf v. *Delange*, 7 App. Cas. 127.

"To give so broad an interpretation to words of exception inserted by the carrier and for his benefit would be contrary to settled rules of construction, and would render nugatory many of the subsequent stipulations of the bill of lading." (Justice GRAY.)

Compania, etc., v. *Brauer*, 168 U.S. 104, 124.

The ship-owner, by the petition, assumes the burden of proof, and makes the issue depend entirely upon the construction of the contract of charter. He relies and must rely upon an express contract; and the only question is whether under its terms the ship-owner primarily can turn the natural and presumed liability of the vessel for a collision loss into a personal liability of the charterer in a proceeding in legal and equitable effect between ship-owner and charterer alone.

Rules for Construction of the Charter Party.

The Court, therefore, in dealing with the express contract of charter to determine the mutual rights and liabilities of the parties to it *inter se* should construe it in the light of the well-settled rules of construction of commercial agreements made between commercial parties competent to contract, inclined to terseness in language and intending that every clause and word should have meaning, and looking to intention rather than to form of expression. There is no presumption that in such commercial contract idle or unnecessary language was used.

"In construing a commercial contract, the object must be to arrive at the real intention of the parties to it. It is that, so far as it can be ascertained, which must determine the meanings of the words and phrases used, their materiality and their dependence one upon another. But the intention must be judged of from the expressions which the parties themselves have given of it, not by reference to what might probably or ought in fairness to have been the intention."

Carver, Carriage by Sea, § 164.

We refer to the following familiar rules of construction as applicable to the charter party before the Court: —

First. The charter party as a commercial contract is to be liberally construed in furtherance of the apparent intention of the parties to it.

Raymond v. *Tyson*, 17 How. 53.
Rich v. *Parrott*, 1 Cliff. 55.
Donahoe v. *Kettell*, *Id.* 141.
Richardson v. *Winsor*, 3 Cliff, 402.

Second. The meaning is to be ascertained by the whole instrument; and every clause and word must be given effect, and that construction of the whole adopted which will best, or most nearly, recognize a meaning and force in each clause and word.

"I think each part of the contract must be looked at with care." (Lord HALSBURY.)

Hogarth v. *Miller*, L. R. (1891) App. Cas. 48. 53.
Glynn v. *Margetson*, L. R. (1893) App. Cas. 351.

"Every clause and even every word should, when possible, have assigned to it some meaning. It is not allowable to presume or to concede, when avoidable, that the parties in a solemn transaction have employed language idly."

Bishop, Contracts, § 384.

"The construction is to be such that the whole instrument or contract and every part of it may take effect if it be possible with the rules of law and the intention of the parties."

Metcalf, Contracts, pp. 287, 288.

"It is a rule that the whole of a contract should be considered in determining the meaning of any or of all of its parts. The reason is obvious. The same parties make all the contract, and may be supposed to have had the same purpose and object in view in all of it; and, if this purpose is more clear and certain in some parts than in others, those which are obscure may be illustrated by the light of the others. . . . All the parts of a contract will be construed in such a way as to give force and validity to all of them and to all of the language used where that is possible."

2 Parsons, Contracts, p. 500.

"In determining the meaning or effect of a clause, the document is regarded as a whole, — one part of it may throw light on another part; and, as far as possible, effect is to be given to all parts. The presumption is that each clause has, or may have, some effect; and a construction of another part of the document which would make the clause inoperative or useless is to be avoided."

Carver, Carriage by Sea, § 173.
Lawrence v. *Aberdein*, 5 B. & Ald. 107, 115.

"In the interpretation of the charter party a meaning must, if possible, be given to every part of it."

Leggett, Charter Parties, p. 4.
Morris v. *Levison*, L. R., 1 C. P. D. 157.

"In the construction of charter parties, as of all instruments,

a construction which gives effect to all the words and provisions is preferred to one which does not."

1 Parsons, Shipping & Adm., p. 319.

Third. The construction of the charter party will in doubt be against the party claiming an exceptional right or release from liability.

"If some of the words of a written agreement, after the whole agreement has been considered, are capable of more than one construction, that interpretation is to be preferred which is least favorable to the party upon whom an obligation is imposed, or in whose favor an exception from or modification of an obligation is created by those words."

Leggett, Charter Parties, p. 30.
Alrey v. *Merrill*, 2 Curtis, 11.

Fourth. Where the parties to the contract have put a practical construction upon it, that construction will be adopted by the Court.

"We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract." (MATTHEWS, J.)

Dist. of Columbia v. *Gallaher*, 124 U.S. 505, 510.

"Where the terms used are indefinite or capable of more than one meaning, or if the materiality or effect of a clause is doubtful, the doubt must be solved by reference to the meanings

which the parties probably attributed to those terms or provisions when they made the contract."

Carver, Carriage by Sea, § 165.
Leavitt v. *Windsor Co.*, 54 Fed. Rep. 439.
Davis v. *Shafer*, 50 *Id.* 764.

The Charter Party does not impose Collision Liability upon Charterer.

As the question depends upon the express terms of the written contract of charter, and the proper inferences therefrom construed under familiar rules and principles, the Court will obtain little assistance by appeal to any general law of bailments. The question is not, Was this a general bailment? but, What were the terms and conditions of the bailment? What liability did bailee assume toward the bailor, and what rights and consequent liabilities were reserved to the bailor by expression or necessary implication?

It is begging the question to assume that the contract is an unqualified demise of the ship, and then argue from the false premise the application of an undisputed rule of the law of bailments.

It is therefore immaterial and unsatisfactory to attempt to decide the disputed liability *inter se* for collision by endeavor to settle whether the contract under construction is a demise of the vessel or a mere hire for carriage; it obviously is neither. Many of its provisions are wholly inconsistent with any claim of a demise or lease, and other provisions are inconsistent with any claim that the contract is a mere contract of carriage.

The issue is not settled by a finding that the contract is or is not a demise or general bailment. The question remains,—If a demise, what limitation or assumption of liability for collision

was contracted for? If not a demise, what liability for collision was assumed or reserved as between the parties?

The answer involves examination of the terms of the express contract, and the construction of the contract under accepted rules.

The contract of charter (Record, pp. 14–18) is in numbered articles, and reference is here made to each.

First. No express assumption by the charterer of liability for collision is claimed. With all the other express assumptions of liability, the contract is entirely silent in regard to this well-known risk. If such great liability was assumed by charterer it was done merely by implication.

Second. As showing that this contract was not an ordinary demise of the vessel, attention is called to the fact that the contract provides for the hire of "two good screw steamships to be built," and indorsed upon the charter party are the requirements in regard to dimensions and build (Charter Party, Record, p. 17). The contract was, therefore, *in futuro* in operation, and was to build the two vessels as a necessary preliminary to their use. The vessels were to be and were completed a year after the date of the contract.

The clauses in the contract upon which the ship-owner must mainly rely to establish his claim of an implied assumption by charterer of liability for collision are clauses 1, 2, and 3 (Record, p. 14), providing for the hire of the two steamships for thirty-six months for the prescribed voyages (Article 1); the charterers to provide and pay for oils and stores, appliances for loading and discharging cargo, and provisions, and wages of captain, officers, engineers, firemen, and crew, who, excepting engineer (for six months), were to be appointed by the charterer (Article 2); and charterers are to provide and pay for all coal-port charges, etc. (Article 3).

See Charter Party, Arts. 1, 2, 3, Record, p. 14.

It is submitted: —

1. Even the appointment and pay of the master, if agreed to without qualification, would not be conclusive of liability as between ship-owner and charterer. The fact is merely one fact to be considered with all the other terms of the charter party. Whatever the liability might be to a third party, as between the parties to the contract, the question remains upon the construction of the contract *inter se*.

2. There is under the charter party no such demise of the vessel as to raise the implication that the charterer assumed the liability for her torts, except as expressly agreed.

The first three articles upon which petitioner's claim rests contain provisions which show that there was no exclusive or unlimited possession given to the charterer.

ARTICLE 1. The charterers "hire" the vessel, and she is to be "placed at their disposal." But her employment is limited to certain voyages and waters.

ARTICLE 2 divides the expense of the vessel. The charterer is to pay for stores, wages, and provisions, and to appoint the captain, officers, and crew. Owners are to appoint the chief engineer for six months. But (*a*) a limitation is put upon the pay, — not to exceed that paid by the charterers in similar vessels, — and (*b*) the owners are to maintain the vessel in a thoroughly efficient state in hull and machinery for the service, including winches with chain gear and donkey boiler. The ship-owner assumes this duty, and, by necessary implication, the possession for the purpose of maintaining the proper repair.

ARTICLE 3 provides that charterers shall pay for all coals, fuel, port charges, pilotages, agencies, commissions, and other charges, excepting for painting and repairs to hull and machinery and anything appertaining to keeping the ship in proper working order, — the repairs, as far as possible, to be done on board by the steamer's staff.

It was wholly unnecessary to provide that charterer should pay for these things if there was a demise of the vessel to the charterer.

ARTICLE 4 provides for payment of charter money semi-monthly. In default of payment the owner can "withdraw said steamer from the service of the charterers" without prejudice, etc. It does not say "repossess" or "take the vessel back," as would be expected in the case of lease or demise, but simply may "withdraw her from the services of charterers."

ARTICLE 5 is wholly immaterial and unnecessary if the charter operated as a demise.

It provides where charterer could load and discharge cargo. If he had full possession and control, the provision was unnecessary.

ARTICLE 6 is likewise unnecessary, on petitioner's theory, in providing that charterer might have use of the whole reach, burthen, and passenger accommodation of the ship, reserving space for officers, etc. The article further provides that cargo can be taken on deck "*at charterer's risk*."

If the vessel's torts and liabilities were at the charterer's risk, why provide for this single liability and expressly put it upon the charterer?

ARTICLE 7 in similar manner puts the expense of loading and discharging upon the charterer, and the "stowage to be under control of master," and "the charterers shall be responsible for the same." Why name this responsibility if it existed under the general tenor and form of the charter party? Why expressly provide liability of charterer for certain acts, and omit collision? The specification of the liabilities assumed by charterer is a necessary exclusion of those not enumerated. So the charterer is to find ballast and dunnage, — an unnecessary provision if he had entire possession and control.

ARTICLE 9 requires owners to dock and paint at their expense every six months if required by charterer, and the time so occupied shall not be paid for by charterer. This is a limitation upon the charterer's possession.

ARTICLE 10 is important, as it expressly defines the extent of

charterers' liability for the acts of master. He is to be under their orders and directions "*as regards employment, agency, or other arrangements, and the charterers hereby agree to indemnify the owners for all consequences and liabilities that may arise from the master signing bills of lading by their orders, or those of their agents, or in otherwise complying with same; the master, although appointed by charterers, to be satisfactory to the qwners.*" EXPRESSIO UNIUS EXCLUSIO ALTERIUS. What effect has this clause upon petitioner's contention? If owners had no responsibility for master, it was unnecessary to exempt themselves from liability for his bills of lading. The express exemption of this liability implies a continuance of liability for his other acts and torts.

It is only upon this theory that the succeeding clause — that "master shall be satisfactory to owners" — has meaning. This is an implied assumption of liability by ship-owner for master's acts and torts, except as otherwise expressly agreed, and the ship-owner protected himself by imposing the condition that the agent for whom he was responsible should be satisfactory to him.

ARTICLE 11 gives the owners still greater control over the master. If the charterers complain of chief engineer during the first six months, the owners are to investigate, and, "if called upon, make a change in the appointments when the steamer is in." Then immediately follows, in written words, the significant provision: "Owners have same privilege as regards captain and officers and engineers during continuance of charter."

The provision might be construed to mean that the owners have the same control over captain and officers as over engineer during the first six months; that is, complaint must be made by charterer to owner and the owner is to investigate the complaint, and, if called upon, make a change. Upon any construction of the clause, the owner had some control over the captain and officers and their continuance in employment.

ARTICLE 13 returns to charterers any hire paid in advance in case vessel should be lost.

ARTICLE 14 gives an option to charterers to purchase.

ARTICLE 16 gives owners a lien on cargo for charter money, and gives charterers lien on vessel for advanced hire not earned. Why give charterer lien on the vessel for unearned freight if vessel was entirely in possession and under control of charterer? Unqualified possession of itself would give the lien.

ARTICLE 17 provides for loss of time from collision or other damage. Such time is deducted from charter money; and if vessel puts into port of distress all charges and expenses are borne by the owners, and "charterers are covered as to expenses to the same extent as the owners are by their insurance." If, then, the steamship had been damaged by this collision she would immediately be at the expense of owners for repair, and in their possession. Was it the intention of this charter party to make a distinction between receiving and inflicting damage by a collision? Was the former intended to be at the expense of the owners, and the latter at the expense of the charterer? Yet the contention of the ship-owner would lead to the peculiar conclusion, that, under this contract, the ship-owner shall pay the damages done by collision to his own vessel, and the charterer must pay the damages done by her in the collision to another vessel. No such division of liability is justified by the contract. Suppose that the steamship had been damaged in this collision to the extent of $10,000, and the schooner $20,000, and that both vessels were found in fault. Under the decision in the *North Star* (106 U.S. 17) the steamship would pay to the schooner one-half of $20,000 less one-half of $10,000; that is, the net sum of $5,000. Upon the theory of the petitioner, as he assumes the repairs to his steamship, he alone would be entitled to the benefit of the $5,000 charged to the schooner, and the charterer would be liable for the $10,000 charged to the steamship for running down; so that, although only $5,000 were paid by steamship to schooner, the charterer would be liable to the petitioner for $10,000. It is submitted that no such construction of this contract is justified by its terms. The

liability to repair damage to the steamship by collision is the same as the liability to pay damages for the collision, — both classes of losses coming within the protection of the insurance.

ARTICLE 18 requires charterers to put in bills of lading the usual "negligence" clause. Why, if charterer, and not vessel, was liable for the acts of the master?

ARTICLE 20 requires owners to furnish a passenger certificate for twenty-four passengers, and fit vessel for their carriage. The owners have possession for this purpose.

ARTICLE 23 divides the benefit of all derelicts and salvages equally between owners and charterer. The master, then, in performing a salvage service must act for both. He is as much the agent of the owners as of the charterers. Suppose in performing a salvage service for this joint benefit he comes into collision, is the charterer to be held responsible for the damage done?

THE CONTRACT IS NOT AN UNQUALIFIED DEMISE OF THE STEAMSHIP.

Under the *first* and *second* rules of construction referred to, it is submitted that, upon the petitioner's theory of a demise and general assumption of liability by charterer, no effect or meaning is given to many of the provisions of the charter party. Reference is especially made to these: —

1. All agreements therein by the charterer to pay for stores (Article 2); to provide coals, etc. (Article 3); to allow charterer to direct place of loading and discharge (Article 5); that charterers shall bear expense of loading and discharging (Article 7); shall order master as regards employment, agency, or other arrangements (Article 10); that charters shall have lien on vessel for advanced and unearned freight (Article 16), — are utterly unnecessary if the charterers had such control and

management as to impose a general liability upon them *inter se* for the torts of the ship.

2. The express exemptions of owners from liability for the carriage of deckload (Article 6); for liability for the stowage (Article 7); for "all consequences or liabilities that may arise from the master signing bills of lading" (Article 10); that the bills of lading shall contain the usual "negligence" clause, — necessarily imply, as matter of reasonable construction, that the vessel remained under general liability, except as expressly provided in these exemptions and agreements.

The Insurance Clause.

Any doubt as to the liability *inter se* of ship-owner or charterer for a collision loss is removed by the express agreement in regard to insurance.

Article 22 of the charter party (Record, p. 16) provides "that the owners shall pay for the insurance on the vessel."

In connection with this is the agreement in Article 17, that if, in consequence of collision or other specified causes, the vessel should put into a port of refuge, the expense shall be borne by the owners; but, if driven into port by stress of weather, the loss of time shall fall upon charterer. "It is understood, in the event of steamer, from above causes, putting into any port or ports other than those to which she is bound, that the charterers are covered as to expenses as the owners are by their insurance." That is, the owners will indemnify the charterers for such expenses to the extent that the same are collected of the underwriters upon owners' insurance.

It is not contended, as argued by ship-owner, either that these clauses give the charterer the benefit of owners' insurance (except, possibly, to the extent provided in Article 17); or, that the owner was under obligation to insure either against peril

of the seas or against running down. If the owner preferred to assume the risk and insure himself, he had the right so to do.

The vital importance of these provisions regarding insurance lies in the necessary inference in construing this contract, that the owner assumed any risk that could be insured against by him. The Court is seeking the intention of the parties, and it must be admitted that the intention regarding liability for running down is left to inference.

It is a fair and natural inference that a party to a contract of lease or hire intends to assume a risk which he expressly agrees to insure against. This is all of our contention. If the owners did not intend to assume the collision risk, they would not have assumed to pay for the insurance against it. If the ship-owner paid the insurance, he was to have the benefit of it as the indemnity for his loss in satisfying lien upon his vessel for collision. The clause otherwise would be misleading, as it induced charterers not to insure. If charterers had insured, it might be double insurance. Two parties would be insuring the same risk. The clear and necessary implication is that the owners understood and agreed that a collision loss should belong and remain on the vessel and they would protect themselves from it by insurance. This section defeats any presumption from other language in the charter party that this insurable risk was assumed by the charterer.

As stated by Judge BROWN, "This express assumption by the owner of the cost of indemnity I regard as a most unequivocal expression of an intention to assume and to relieve the charterer from all risks that would be covered by 'the insurance on the vessel,' for which the owner was to pay."

Opinion, Record, p. 93.

1. As the importance of these insurance provisions bears only upon the intention of the parties upon the question of con-

struction, it is immaterial to inquire whether insurance against perils of the sea would or would not include the running-down risk. In Massachusetts it would.

Nelson v. Suffolk Ins. Co., 3 Cush. 477.

In the United States Courts it probably would not.

Ins. Co. v. *Sherwood*, 14 How. 351.

There can be no doubt that the owner assumed in the agreement to pay for insurance on the vessel (Article 22), and such insurance and what should be included in it for his protection were matters entirely in his discretion. It is admitted (Agreed Facts, Article 8, Record, p. 38) that he "carried a line of insurance on the vessel against sea perils, including collisions, but not for the full value of the vessel." He had an option to insure or not, and to decide the amount and nature of risk he would insure, and the risk he would assume without insurance.

2. The argument of the ship-owner regarding the position of the insurance clause in this charter party assists the contention of the charterer. The argument is that this article (22) naturally and historically, in the ordinary form of such charter parties, belonged somewhere in Article 2, specifying what expenses were to be assumed by the ship-owner.

It is submitted, —

(*a*) The obvious fact that the insurance clause was taken out of such context, and made a separate article in the contract, merely emphasizes its importance and meaning in showing the most deliberate intention of the parties that the ship-owner should assume every insurable risk not expressly excepted in the contract.

(*b*) This insurance clause is not negative, — that charterer need *not* pay for insurance, — but affirmative, that the owners *shall* pay for the insurance.

(*c*) It is difficult to see any difference in legal construction and effect, whether the provision was made an independent article in the contract or was added to any general provision fixing the liabilities assumed by the ship-owner. The agreement wherever inserted is a material part of the contract, and must be recognized as such.

The ship-owner's contention comes to this: He has insured the vessel against running down to the extent he saw fit, and presumably can collect or has collected from the underwriter the amount of insurance. If the prayer of the ship-owner against the charterer is granted by the Court, then the ship-owner will be entirely relieved, and so relieve the underwriter from any claim to respond to the libel. The underwriter is relieved at the expense of the charterer. The litigation here must be regarded in legal consequence as for the benefit of the underwriter in the name of the ship-owner, to impose the insurable and insured risk upon the charterer, although insured against and paid for by the ship-owner. What did the ship-owner intend when he insured the collision risk and paid the premium therefor? What did the underwriter assume when he accepted the risk and took the premium? Was the risk simply the solvency of the charterer? If the ship-owner, or his underwriter in his name, can enforce a primary liability for running down upon the charterer, and the latter is able to respond, the underwriter has given no consideration for the running-down premium paid by the ship-owner, and presumably charged to and paid by the charterer in the charter money.

It is submitted that in determining the intention of the parties to this charter party, it must be presumed that the ship-owner intended to get a *quid pro quo* from the underwriters, and by the insurance to relieve the charterer from any liability which

could be covered by insurance. Whether the premium paid for such indemnity is "a fixed charge," or provided by special agreement, it was paid by the ship-owner for some other purpose than to relieve the underwriter by imposing liability upon the charterer.

The Construction of the Contract by the Acts of the Parties.

The *fourth* rule of construction, referred to above, has peculiar application, because the ship-owner has put a practical construction upon the charter party, and accepted under it the fact and intention that liability for collision belonged to the vessel and not to the charterer.

The acts of the parties are agreed in the stipulation.

Article Eighth, Record, p. 38.

(1) The Boston Fruit Company had no insurance upon said steamship.

(2) The ship-owner carried a line of insurance on the vessel against sea perils, including collisions, but not for the full value of the vessel, the owner being in part uninsured.

This affirmative action in getting insurance by the ship-owner, and the negative action by the charterer in not doing so, are competent evidence in strong support of our contention regarding the intention of the parties. It is not probable that the charterer intended personally to insure the ship-owner against the running-down risk, and took out no insurance to protect himself against such risk.

Cases cited *supra*.

In further confirmation of this contention is the action of ship-owner, through the master, in claiming vessel after libel was filed, and giving the required stipulations to respond to the decree. Not until April 8, 1896 was any indication shown to hold the charterer as a party in interest.

Claim, Record, p. 4.
Stipulations, *Id.*, p. 5.

(3) Mr. BENNETT, the ship-broker who negotiated the charter party, and drafted it, had the interviews explained by him with the representatives of the ship-owners.

Bennett, Evidence, Record, pp. 39–67.

Upon cross-examination (Int. 64, Record, p. 44) he says: "I have had a good deal of experience in various insurance claims, — so much so that I clearly explained to the owner that he would have to pay for all insurance on the vessel in any way, shape, and manner, against stranding, collision, and everything, as is usually done in all vessels, unless he wanted to take the risk and not insure." The statement is not contradicted.

The owner, then, assumed the insurance risk with full knowledge of the consequences, and of the liability upon him or his underwriter in case of collision.

The evidence was held competent by the Court as proving that his attention was particularly called to the provision, and as interpreting and making certain the terms.

Lonergan v. *Buford*, 148 U.S. 581, 588.

The evidence is a circumstance surrounding the adoption of the contract, of assistance in determining the subject-matter and

meaning of the insurance provision and the standpoint of the parties in relation to it.

Fire Ins. Asso. v. *Wickham*, 141 U.S. 564.
Clay v. *Field*, 138 *Id.* 464.
Mobile, etc., R.R. v. *Jurey*, 111 *Id.* 584.

(4) The negative evidence from the ship-owners' witnesses —that, under a charter imposing the duty of insuring upon the ship-owner, no case is known of an attempt to hold charterer liable for the insurable risk — is entitled to weight.

Mr. GOURLIE (the noted average adjuster and writer) says: "To me that is novel. I have never known it to be done."

Cross-Ints. 35, 36, Record, p. 71.

Mr. CADIZ says: "I never knew of a case."

Cross-Int. 20, Record, p. 77.

Mr. HALL has never known a case where a ship-owner, having agreed to pay for the insurance on the vessel, made a claim upon the charterer for any damage by running down.

Cross-Int. 68, Record, p. 82.

Mr. BARBER says: "Where the owner agrees to pay for the insurance, he has the benefit of it; if the charterer is to have any interest in it, it must be expressly so provided; the owner paying for the insurance is, in the commercial meaning of the expression, to assume the risk and pay for it. He has never

known a case where, under a provision that the owner shall pay for the insurance, the owner has made claim upon the charterer for a running-down loss.

Cross-Ints. 21–25, Record, p. 85.

Authorities Cited.

If the contention of the charterer above submitted be correct, that the question before the Court depends upon the construction of a special express contract between ship-owner and charterer, little assistance is afforded by reported cases. The ship-owner admits and argues that the contract in its provisions, and in the context of them, is peculiar.

There are two general points of distinction from cases relied upon by the petitioner.

1. The controversy is confined to the contractual relation of ship-owner to charterer, arising from the written contract of charter. The only interest of the libellants as a third party, outside any contract, is to recover from the vessel; and the decree, from which they take no appeal, gives this right. What right the libellants would have to sue in tort the charterer, as held out to have assumed responsibility, it is immaterial to inquire. The libellants have recovered from the vessel, and the only question here is, in effect, whether the ship-owner can, by virtue of his contract, recover over against his charterer.

2. The cause of action is based not upon contract, but upon maritime tort, for which libellants can look to vessel as the tort feasor.

Even under these limitations the courts refuse to recognize as a demise of a vessel any agreement which does not give to the charterer "complete and absolute control."

"Stipulations that the general owners shall keep the vessel in good condition during the existence of the charter, and receive on board certain goods at the request of the government and refuse to receive other goods without its assent, would be out of place and inappropriate if the government were at the same time special owners of the vessel for the service stipulated, having the vessel in its entire possession and control. Great weight was given to similar clauses by the King's Bench in *Saville* v. *Campion* (2 B. & Ald. 511), and by the Supreme Court of New York in *Clarkson* v. *Edes* (4 Cowen, 477). In each of these cases they were held conclusive that the possession and control of the vessel had not passed to the charterer, but had been retained by the general owner." (Justice FIELD.)

Leary v. *U.S.*, 14 Wall. 607, 612.

Cited with approval, —

U.S. v. *Shea*, 152 U.S. 178.

The case relied upon of *Baumwell, etc.*, v. *Furness* (1893), App. Cas. 8, has no application to the *inter se* contract relations between the parties to the charter party in litigation.

In that case the shippers of cotton sued the ship-owner for loss under bill of lading given by the master as agent of the charterer.

The charter party provided, as in this case, that owners were to be relieved "from all consequences or liabilities that may arise from the captain signing bills of lading." It was an action of contract by shipper against ship-owner, and depended upon the authority of the master of the chartered vessel to bind the owner to personal liability under the bill of lading. The Court reversing the decision of the lower court [(1891) 2 Q. B. 310]

held the ship-owner not responsible. He stood in no such relation to the master as to be personally bound to the holder of the bill of lading by the acts or fault of the master.

So in *Meiklereid* v. *West*, 1 Q. B. D. 428, the ship-owner was found not liable in a personal suit upon an allotment note given to a sailor by the master of a demised vessel.

It is submitted that the case before the Court depends entirely (1) upon the construction of the charter party in suit, and (2) upon the mutual relations under it of the parties to it without regard to outside third parties, and (3) that the proper construction of its terms in connection with the contemporaneous acts of the parties to it will not justify the transfer of the admitted and decreed liability of the vessel for this collision loss from the ship-owner to the charterer.

The Boston Fruit Company submits that the decree should be affirmed, with costs.

CHAS. THEO. RUSSELL,
ARTHUR H. RUSSELL,
Counsel for Boston Fruit Company.

No. 178. 2085

Br. & Carver & Blodgett for Appt

Supreme Court of the United States.

Office Supreme Court U.S.
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No. 178. October Term, 1899.

Filed Jan. 28, 1901.

TURRET STEAMSHIPPING COMPANY, Ltd.,
CLAIMANT OF STEAMSHIP "BARNSTABLE," PETITIONER,

vs.

A. G. HALL ET AL., LIBELLANTS AND INTERVENING PETITIONERS, OWNERS AND CREW OF LATE SCHOONER "FORTUNA,"

AND

THE BOSTON FRUIT COMPANY,
RESPONDENT

BRIEF FOR A. G. HALL ET AL.

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THE HEINTZEMANN PRESS, BOSTON.

Supreme Court of the United States.

No. 178. OCTOBER TERM, 1899.

TURRET STEAMSHIPPING COMPANY (LTD.),
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AND

THE BOSTON FRUIT COMPANY, RESPONDENT.

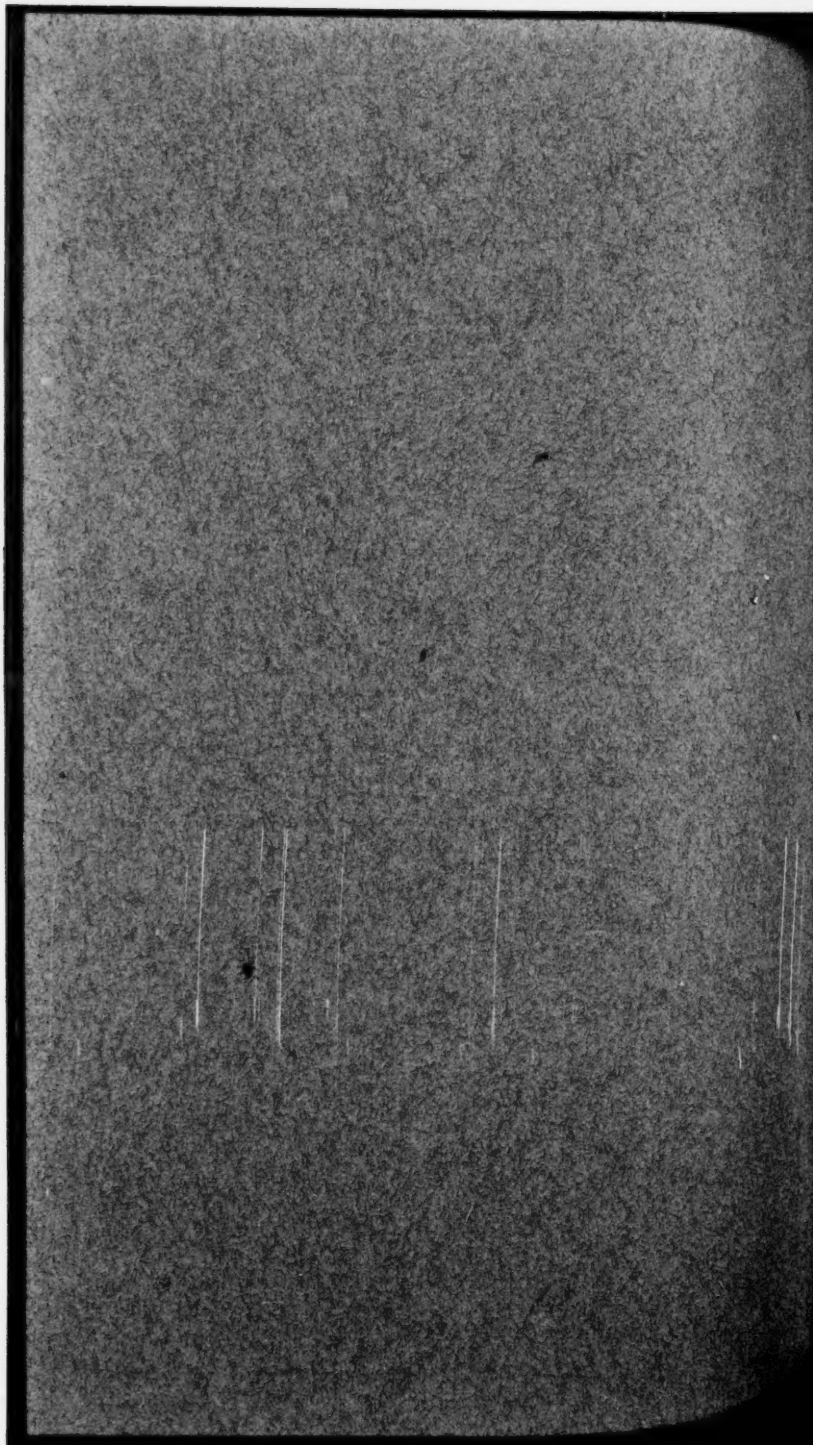
BRIEF FOR A. G. HALL ET AL.

It is admitted in this case that a decree was properly entered in the District Court in favor of A. G. HALL ET AL., libellants and intervening petitioners, against the steamship "BARNSTABLE" and her claimant, and no appeal has been taken from that decree. The only question involved is whether the decree should have been also entered against the BOSTON FRUIT COMPANY. And it is admitted that whatever the

decision of this court may be as to whether or not the decree in favor of said libellants and intervening petitioners should have been entered also against the BOSTON FRUIT COMPANY, that in any event a decree in their favor must be entered against the steamship "BARNSTABLE" and her claimant.

EUGENE P. CARVER,
EDWARD E. BLODGETT,

Counsel for A. G. Hall et al,
Libellants and Intervening Petitioners.



No. 178

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Supreme Court of the United States.

No. 484

Filed Mar. 29, 1900.

TURRET STEAM SHIPPING COMPANY, LIMITED,

vs.

A. G. HALL ET ALS., LIBELLANTS, PETITIONERS,

AND

THE BOSTON FRUIT COMPANY.

MOTION FOR EXECUTION AGAINST CLAIMANT OF THE STEAMSHIP "BARNSTABLE."

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

The Petition of A. G. HALL ET ALS., owners of the late schooner "Fortuna," Libellants, ARTHUR W. NUNAN, Petitioner, HAROLD EMENAN ET AL., Administrators, Petitioners, and ISAAC B. STEWART, Administrator, Petitioner,

Respectfully shows unto the Court as follows:

First: These proceedings were commenced by the libel of A. G. Hall and others against the steamship "Barnstable," and intervening petitions were filed by Arthur W. Nunan and by Harold Emenan et al., and by Isaac B. Stewart. A decree was entered in the District Court in favor of all the parties against the steamship "Barnstable."

Second: The claimant of the steamship "Barnstable" admits that it is responsible to these petitioners, and the only question involved in the case at the present time is whether or not they can make the Boston Fruit Company jointly responsible.

Third: No appeal has ever been taken by either party from the decree in favor of these petitioners, but the petitioners are unable to obtain a mandate from the Circuit Court of Appeals or an execution in the United States District Court, because the writ for certiorari having been granted to this Court, the whole case is before this Court.

Fourth: Prior to the application for certiorari to this Court, your petitioners moved in the Circuit Court of Appeals for the First Circuit, that a mandate should issue in their behalf against the claimant of the steamship "Barnstable," on the ground that no appeal had been taken from the decree in their favor; but the Court refused to issue the mandate until it was determined whether the writ of certiorari would be issued or not, and upon the issuance of that writ the Court had no further jurisdiction in the matter.

Fifth: The counsel for the owner of the steamship "Barnstable" and the counsel for the Boston Fruit Company by their petition for certiorari and their answer to the same, both admit that your petitioners are entitled in any event to recover the full amount of the decree with interest and costs from the claimant of the steamship "Barnstable;" but the owner of the steamship "Barnstable" is unwilling to pay the amount due to your petitioners without an order of Court for fear it may prejudice its rights as against the Boston Fruit Company in this Court.

WHEREFORE, your Petitioners pray that an order may issue to the Circuit Court of Appeals for the First Circuit, ordering it to issue a mandate in favor of your petitioners against the steamship "Barnstable" to the United States District Court for the District of Massachusetts, affirming the decree of that Court as against the claimant, the owner of the steamship "Barnstable," and its sureties, and ordering the District

Court to issue execution in favor of your petitioners against the claimant of the steamship "Barnstable" therefor; without prejudice to the rights of the claimant of the steamship "Barnstable," to proceed in this Court against the Boston Fruit Company, and to have the decree of the District Court reversed, if this Court deem proper, in so far as the Boston Fruit Company and the claimant of the steamship "Barnstable" are concerned.

A. G. HALL ET ALS., LIBELLANTS-PETITIONERS.

By CARVER & BLODGETT, THEIR PROCTORS.

Supreme Court of the United States.

No. 178.—October Term, 1900.

The Barnstable. } On writ of certiorari to the Circuit Court of Appeals for the First Circuit.

[May 13, 1901.]

This case originated in a libel by the owners of the schooner Fortuna against the British steamship Barnstable, for a collision which took place place off Cape Cod on January 13, 1896, and resulted in a total loss of the schooner, and the personal effects of her master and crew. Nine of the crew were drowned.

A claim was interposed by the master of the Barnstable on behalf of the Turret Steamshipping Company, a British corporation, and the owner of the steamship; and an order was subsequently entered substituting that corporation as claimant.

Before the time to answer expired, the Turret Company presented a petition, setting forth that at the time of the collision the Barnstable was chartered to the Boston Fruit Company, a Massachusetts corporation; that the charterer supplied its own officers and crew, who were navigating the vessel at the time of the collision, and that, if there were any faults on the part of the Barnstable, they were the faults of the charterer and not those of the owner. In compliance with the prayer, a summons was issued to the Boston Fruit Company to appear before the District Court to answer the petition. The company appeared and answered, admitting the charter, (copy of which was annexed to the petition,) but denying liability for the negligence of the officers and crew of the steamship, or that it had assumed liability therefor under its charter.

Subsequently, however, but after certain testimony had been taken, counsel for the owners and also for the charterer became satisfied that the Barnstable was in fault, and assented to a decree against her, leaving the question of liability as between the owner and charterer to be passed upon by the court.

The material provisions of the charter party, which was for thirty-six months from March, 1894, were that the charterer should "provide and pay for all oils and stores for the vessel, gear, tackle and appliances for loading and discharging the cargo, and for all the provisions and wages of the captain, officers, engineers, firemen and crew, who, except the guarantee engineer, shall be appointed by them;" that the owners should "maintain

the vessel in a thoroughly efficient state" for the service, but the charterer should "provide and pay for all the coals, fuel, port charges, pilotage, agencies, commissions and *all other charges whatsoever*, excepting for painting and repairs to hull and machinery and everything appertaining to keeping the ship in proper working order;" to pay for her use £550 per month, and that "in the event of loss of time from collision, stranding, want of repairs, break down of machinery, or any cause appertaining to the duties of the owner, preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease from the hour when detention begins until she be again in an efficient state to assume her service." There was a final and most important provision, upon the construction of which the case turned, "that the owners shall pay for the insurance on the vessel."

The case, as thus presented between the owner and the charterer, was submitted to the District Court, which dismissed the owner's petition, holding it to be liable under the charter for the consequences of the collision. (84 Fed. Rep. 895.) This decree was affirmed by the Circuit Court of Appeals. (94 Fed. Rep. 213.)

Mr. Justice BROWN delivered the opinion of the Court.

The question involved in this case is, whether the owners of a vessel, who have let it out upon charter party and agreed to pay "for the insurance on the vessel," are liable, as between themselves and the charterers, for damage done to another vessel by a collision resulting from the negligence of the officers and crew, who are appointed and paid by the charterers.

1. It was within the power of the court, under general Admiralty Rule 59, to entertain the petition of the Turret Steamshipping Company, owner and claimant of the Barnstable, and to call in the charterer to show cause why it should not be condemned for the damage resulting from this collision. (*The Alert*, 40 Fed. Rep. 836.) Such proceeding, though not within the words, is clearly within the spirit of the rule; and the case, as between the Turret Company and the Fruit Company, thereafter proceeded substantially as an independent cause, in which the original libellants had no substantial interest, their claim being adequately protected by the decree against the Barnstable. The position of the Turret Company was in no manner affected by the failure of the libellants to appeal from their own decree.

2. Whatever may be the English rule with respect to the liability of a vessel for damages occasioned by the neglect of the charterer, as to which there appears to be some doubt, (*The Ticonderoga*, Swabey, 215; *The Lemington*, 2 Asp. Mar. Law Ca. 475; *The Ruby Queen*, Lush. 266; *The Tasmania*, 13 P. D. 110; *The Parlement Belge*, 5 P. D. 197; *The Castle*

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gate, (1893) App. Ca. 52; *The Utopia*, (1893) App. Cas. 492,) the law in this country is entirely well settled, that the ship itself is to be treated in some sense as a principal, and as personally liable for the negligence of any one who is lawfully in possession of her, whether as owner or charterer. (*The Little Charles*, 1 Brock. 347, 354.) It was said by this court in the case of *The Palmyra*, (12 Wheat. 1, 14,) referring to a seizure in a revenue case: "The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this whether the offense be *malum prohibitum* or *malum in se*. The same thing applies to proceedings *in rem*, on seizure in the admiralty." So in *United States* v. *Brig Malek Adhel*, (2 How. 210,) speaking of a forfeiture incurred by a piratical aggression, Mr. Justice Story remarked (p. 233): "That the act makes no exception whatsoever, whether the aggression be with or without the co-operation of the owners. The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner. . . . It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which, or by which, or by the master or crew thereof, a wrong or offense has been done, as the offender, without any regard whatsoever to the personal misconduct or the personal responsibility of the owner thereof." This was the principle upon which this court held, in the case of *The China*, (7 Wall. 53,) that a vessel was liable for a collision occasioned by the fault of a compulsory pilot—a marked distinction from the English rule, which, by statute, exempts the vessel from such consequences.

Indeed, the liability of the vessel for the negligence of the charterers is now fixed by statute in this county. (R. S. sec. 4286.) "The charterer of any vessel, in case he shall man, victual and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this title relating to the limitation of the liability of owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof."

As the charterers hired the Barnstable for a definite period, and agreed to select their own officers and crew, and pay all the running current expenses of the vessel, including the expense of loading and discharging cargoes—the owners only assuming to deliver the vessel to the charterers in good order and condition, and to maintain her in an efficient state during the existence of the charter party, there can be no doubt that, irrespective of any special provision to the contrary, the charterers would be liable for the consequences of negligence in her navigation, and would be bound to return the steamer to her owners free from any lien of their own contracting, or caused by their own fault. (*Thorp* v. *Hammond*, 12 Wall. 408; *Williams* v. *Hayes*,

143 N. Y. 442; *Scott* v. *Scott*, 2 Starkie, 438; *Webster* v. *Disharoon*, 64 Fed. Rep. 143; *Galzoni* v. *Tyler*, 64 Cal. 334, 386.)

This, indeed, is but the application to charter parties of the ordinary law of bailment, which requires that the bailee return the property to the owner in the condition in which it was received, less the ordinary results of wear and tear, and such injuries as are caused by a peril of the sea, or inevitable accident. (*Coupé Co.* v. *Maddick*, (1891) 2 Q. B. 413; *Sturm* v. *Boker*, 150 U. S. 312; Story on Bailments, secs. 25 to 32.)

If, then, the owners be liable for the negligence of the charterers, such liability must arise from the particular stipulation in the charter party that "the owners shall pay for the insurance on the vessel." The language of the clause is peculiar and significant. It is not an agreement to *insure*, or to procure or provide insurance, but to *pay for* such insurance as the owner should see fit to take out—and perhaps inferentially to apply such insurance toward the extinguishment of any liability of the charterers for losses covered by the policy. It is entirely clear that, under this stipulation, the owners could not charge the charterers with the expense of insurance, that is, the premiums, whatever form of policy the owner might select, though insurance be in fact a part of the running expenses of the vessel, and perhaps, in the absence of a special clause, covered by the stipulation that "the charterers shall provide and pay for all the coals and fuel, port charges, pilotages, agencies, commissions, *and all other charges whatsoever*, except for painting and repairs to hull and machinery, and anything appertaining to keeping the ship in proper working order."

It may be conceded, however, that for any damage to the vessel coverable by an ordinary policy of insurance "on the vessel" the owners must look to the companies, at least for the insured proportion of such damage, and not to the charterers. It may also be conceded that the owner might have selected a form of policy containing a special running-down clause that would have covered damages done to another vessel, though the rule in this court is, following the English case of *De Vaux* v. *Salvador*, (4 Ad. & El. 420,) that an ordinary policy against perils of the sea does not cover damage done to another vessel by collision. (*Gen. Mutual Ins. Co.* v. *Sherwood*, 14 How. 351.) Mr. Justice Curtis remarked in this case (p. 363): "We believe that, if skillful merchants, or underwriters, or lawyers, accustomed to the practice of the commercial law, had been asked whether the insurers on one vessel were liable for damage done to another vessel, not insured by the policy, by a collision occasioned by the negligence of those on board the vessel injured, they would, down to a very recent period, have answered unhesitatingly in the negative." This case was decided in 1853, although shortly before that the Supreme Court of Massachusetts had held in *Nelson* v. *Suffolk Ins. Co.*, (8 Cush. 477,) that a policy on the vessel covered damages which the

vessel insured might do to another vessel. The same view had already been taken by Mr. Justice Story in *Hale* v. *Washington Ins. Co.*, (2 Story, 176.) In speaking of these cases Mr. Justice Curtis observed (p. 367): "But with great respect for that eminent judge, and for that learned and able court, we think the rule we adopt is more in conformity with sound principle, as well as with the practical interpretation of the contract by underwriters and merchants, and that it is the safer and more expedient rule. We cannot doubt that the knowledge by owners, masters and seamen that underwriters were responsible for all the damage done by collision with other vessels through their negligence would tend to relax their vigilance and materially enhance the perils, both to life and property, arising from this case [cause]." As the construction of a policy of insurance is one of general rather than one of local law, (*Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 443; *Gloucester Ins. Co.* v. *Younger*, 2 Curt. 322,) we are constrained to adopt our own views as to such construction, though the courts of the State in which the cause of action arose have adopted a different view.

But, whatever be the obligation as between the insured and his underwriters, this clause in the charter party should be construed in consonance with its other provisions, and with the obvious intention of the parties that the duty of the owner is discharged by keeping the vessel in good order and condition, and that the charterers assumed and agreed to pay all her running expenses. Conceding that damages done to another vessel are neither the one nor the other, they are incident rather to the navigation than to the preservation of the vessel, although the cost of the premiums may be referable to the preservation of the ship, inasmuch as the owner obtains the benefit of them in case of damage or loss, for which, as between him and the charterer, he is chargeable. If the responsibility for an extraordinary class of damages, that is, done to another vessel, be thus shifted from the charterer, by whose agents the damage is done, and to whom its reimbursement properly belongs, to the owners, it should be evidenced by some definite undertaking to that effect, and not be inferred from an obscure provision of the charter party, which seems to have been designed for a different purpose. It is scarcely credible that the owners could have intended to assume a liability for the acts of men not chosen by themselves and entirely beyond their control, which in this case equalled the hire of the ship for eight months, and might, had the Fortuna been of greater value, have exceeded the whole amount of rent payable by the charterers.

There is undoubtedly weight to be given to the proposition that, unless we hold the owners liable for everything a policy of insurance could have covered, the clause is of little value, since the charterers would not in any event be liable for damages resulting from the perils of the sea or other risks ordinarily covered by insurance upon the vessel. But this argument

loses much of its force in view of the ruling of this court that an ordinary policy of insurance on a vessel does not cover damages done to another vessel; and as there seems to be a difference in practice, some charters providing that the insurance shall be paid by the charterer, (*Latson* v. *Sturm*, 2 Ben. 328,) and others providing that it shall be paid by the owner, we think the probable object of the clause was to fix beyond cavil the responsibility for premiums. It was probably inserted in this charter to negative the inference derivable from that provision of the charter, imposing upon the charterers the obligation to pay the running expenses of the vessel, and *all other charges whatsoever*. But, however this may be, we find ourselves unable to give it the broad construction, that it was intended to fix upon the owners a new and extraordinary liability, which we think could not have been within the contemplation of the parties.

The evidence of a parol understanding as to the meaning of the insurance clause in this connection, is entitled to no weight whatever. In answer to a question put to the broker who negotiated the charter, upon cross examination, he testified as follows:

"Q. You have had no experience, I understand you, of the actual working out of this clause in any particular cases?

"A. I have had considerable experience in various insurance claims—so much so that I clearly expressed to the owner that he would have to pay for all insurance on the vessel in any way, shape or manner against stranding, collision and everything, as is usually done in all vessels, unless he wanted to take the risk and not insure.

"Q. Tell us what experience you have actually had of these insurance clauses, or the working out of them?

"A. I have never known an owner to insure a charter for damage by collision before. He has always taken that risk."

Several answers may be made as to any inference derivable from this testimony. In the first place, the answer to the first question was not responsive to the question at all. In the second place, it was not the testimony of an expert as to the meaning of this clause among underwriters, and their customers, in which case it might properly have been admissible, but an attempt in respect to the particular charter, to introduce the antecedent understanding of the parties, and thereby to explain, control and qualify the language of the charter. This was obviously impossible. (*Seitz* v. *Brewers' Refrigerating Co.*, 141 U. S. 510.) Finally, giving to the answer its full effect, his statement of the owner's liability does not include damage which might be done to other vessels.

The statement of the witness, too, differs from his testimony upon direct examination, which was as follows:

"Q. Did you have any conversation with Mr. Craggs (the then owner of the vessel) with regard to that clause?

"A. I did; several.

"Q. Please state the substance of that conversation.

"A. I told him that he would have to insure for his vessel the same as the charter party stated.

"Q. Did he make any reply?

"A. Of course, I told him if he did not want to insure, he could take that risk. But his intention was to insure."

In addition to this, however, the testimony was quite inadmissible as against the Turret Steamshipping Company, the purchaser of the vessel and the assignee of the charter party, since it was not shown to have had any notice of the conversation, and therefore, in taking over the charter, was only bound by the obligations imported by the words of the insurance clause in their ordinary commercial sense. (*Page* v. *Cagwin*, 7 Hill, 361; *Bristol* v. *Dann*, 12 Wend. 142; *Clews* v. *Kehr*, 90 N. Y. 633; *Truax* v. *Slater*, 86 N. Y. 630; *Tabor* v. *Van Tassel*, 86 N. Y. 642.)

In conclusion, we are of opinion that, if anything more were intended by the insurance clause than to impose on the owners the duty of paying the premiums, it was fully satisfied by an ordinary policy of insurance against perils of the sea; that such policy would not cover damage done to another vessel by a collision with the vessel insured, and that the primary liability for such damage rested upon the charterers and not upon the owners. We express no opinion as to the effect of any payment that may have been actually made by the underwriters upon this loss.

The decrees of both courts must therefore be reversed, and the case remanded to the District Court for the District of Massachusetts, for further proceedings not inconsistent with this opinion.

True copy.

Test:

Clerk Supreme Court, U. S.